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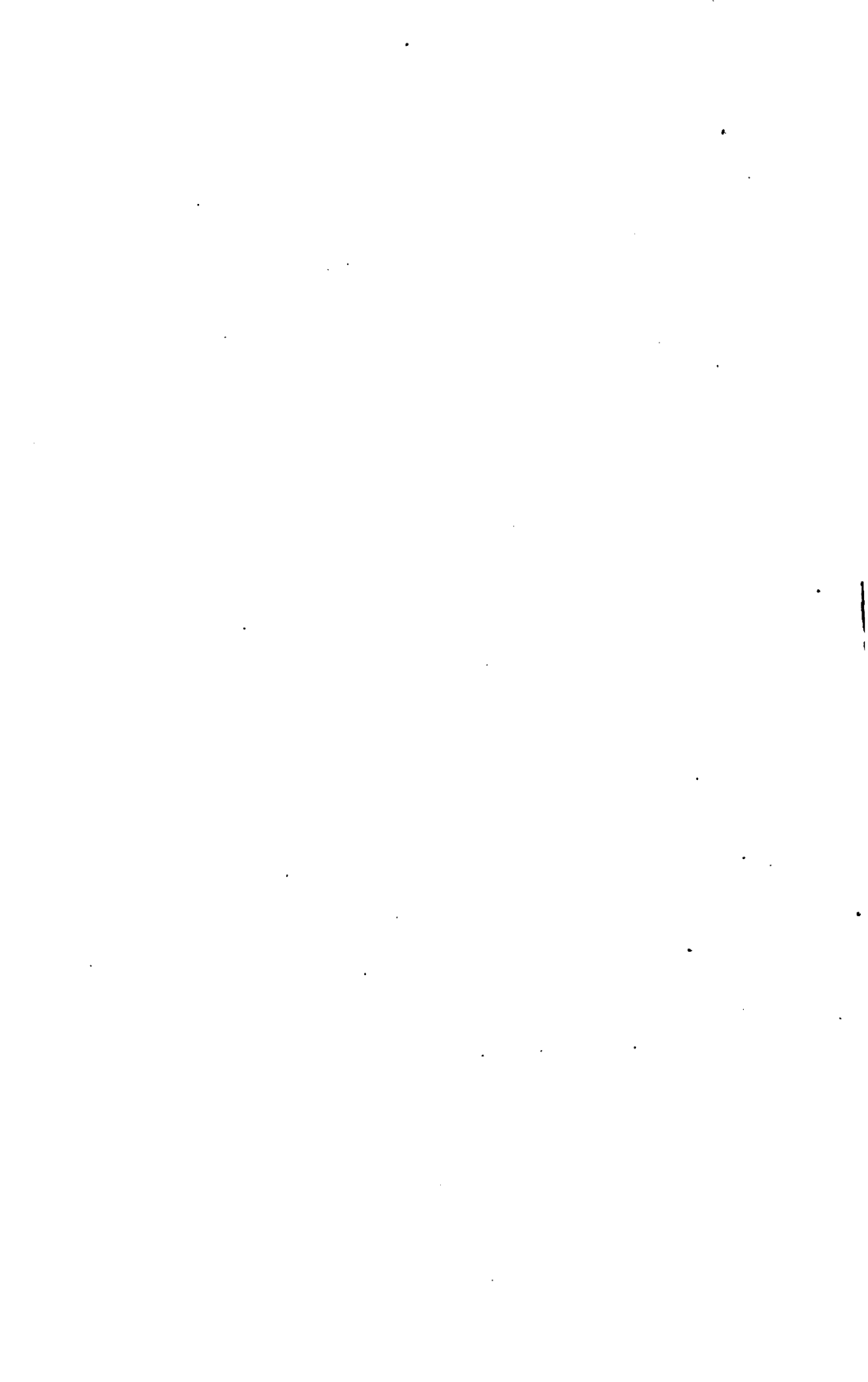
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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF
LOUISIANA.

VOLUME XXIX.
FOR THE YEAR
1877.

PERCY ROBERTS,
REPORTER.

NEW ORLEANS:
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1878.

rec. Feb. 27, 1873

JUSTICES AND OFFICERS OF THE COURT

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE,
THOMAS COURTLAND MANNING.

ASSOCIATES,
ROBERT HARDIN MARR,
ALCIBIADE DeBLANC,
WILLIAM B. GILES EGAN,
WILLIAM BRAINERD SPENCER.

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REPORTER,
PERCY ROBERTS, Esq.

CLERKS,
ALFRED ROMAN.....NEW ORLEANS.
BENJAMIN R. ROGERS....OPELOUSAS.
TALBOT STILLMAN.....MONROE.



ERRATA.

- Page 35, line 28, read "Dallos" for "Dallas."
- Page 37, line 16, read "Jarman" for "Jasman."
- Page 69, line 20, read "*instanti*" for "*instante*."
- Page 121, line 9, insert "under execution" between the words "sale" and "issued."
- Page 138, line 34, read "of" for "upon."
- Page 231, line 17, read "personal" for "persenal."
- Page 267, line 5, read "act" for "debt."
- Page 285, line 35, read "J. G. White" for "T. C. Manning."
- Page 300, line 41, read "*dictum*" for "doctrine."
- Page 331, line 10, read "mortgaged" for "mortgage."
- Page 331, line 12, read "mortgagor" for "mortgager."
- Page 84, line 17, read "when" for "where."
- Page 113, line 19, for "a part" read "as a part." Same page, line 21, for "is" read "are."
- Page 132, line 9, for "has" read "had."
- Page 149, last line, for "then," read "thus."
- Page 152, line 1 of paragraph 5, for "unconnected facts," read "uncontradicted facts."
- Page 153, line 1 of paragraph 2, for "condemn" read "consider."
- Page 207, line 3 of the opinion, for "Givins," read "Générés."
- Page 210, line 11 from bottom, for "claim" read "clause."
- Page 261, line 6, for "one" read "once."
- Page 270, line 4, for "mandamus, which" read "mandamus, that which."
- Page 282, line 11, for "advertisement" read "assignment."
- Page 290, line 11 from bottom, for "man" read "mass."
- Page 309, line 5, for "dreadful" read "disdainful."
- Page 310, line 9, for "fully" read "fairly."
- Page 314, line 1, for "*manière compromise*" read "*manie confirmee*."
- Same page, line 14, for "combat" read "contest." Same page, line 20, for "an enlightened or difficult science" read "as enlightened or difficult a science."
- Page 276, line 10 from bottom, for "then opposed," read "then affected."
- Page 18, line 12, for "re-date," read "relate."
- Page 18, line 41, for "in a like manner," read "in like manner."
- Page 18, line 42, for "in the like effect," read "with like effect."
- Page 24, line 5, for "Buggs," read "Briggs."

-
- Page 24, line 27, for "plea of judgment," read "plea of payment."
Page 87, line 30, for "1 An.," read "10 An."
Page 92, line 15, for "presented," read "prescribed."
Page 99, line 33, for "*actis*," read "*actio*."
Page 101, line 9, for "De Sota," read "De Soto."
Page 201, line 23, for "court of jurisdiction," read want of "jurisdiction."
Page 214, line 32, for "petitioner," read "petition."
Page 236, line 2, for "secure," read "leave."
Page 236, line 14, for "these," read "those."
Page 248, line 39, for "for debts," read "her debts."
Page 248, line 40, for "with the liability," read "with liability."
Page 249, line 4, for "of New Orleans. She," read "of New Orleans, she."
Page 253, lines 29, 30, for "*re sei pesenent*," read "*rescripserunt*."
Page 254, line 16, for "that it is not," read "that he is not."
Page 255, line 6, for "dollars was retained," read "dollars were retained."
Page 291 *et seq.*, for "Segras," read "Legras."
Page 396, line 2, for "court," read "courts."
Page 396, line 3, for "declared," read "declares."
Page 355, line 7, for "Cullom, J.," read "Rogers, J."
Page 398, line 19, for "Cullom, J.," read "Rogers, J."
Strike out "simulation" in digest of the case of Renshaw & Cammack vs. Hebert, page 285.
In case of Daniel, page 755, I state that it is an appeal from the Second Judicial District Court, and that the decision was an opinion of the court. This is a mistake. It was not an appeal, but an original application for *habeas corpus*, and the opinion was the individual opinion of Justice Marr.
PERCY ROBERTS, Reporter.

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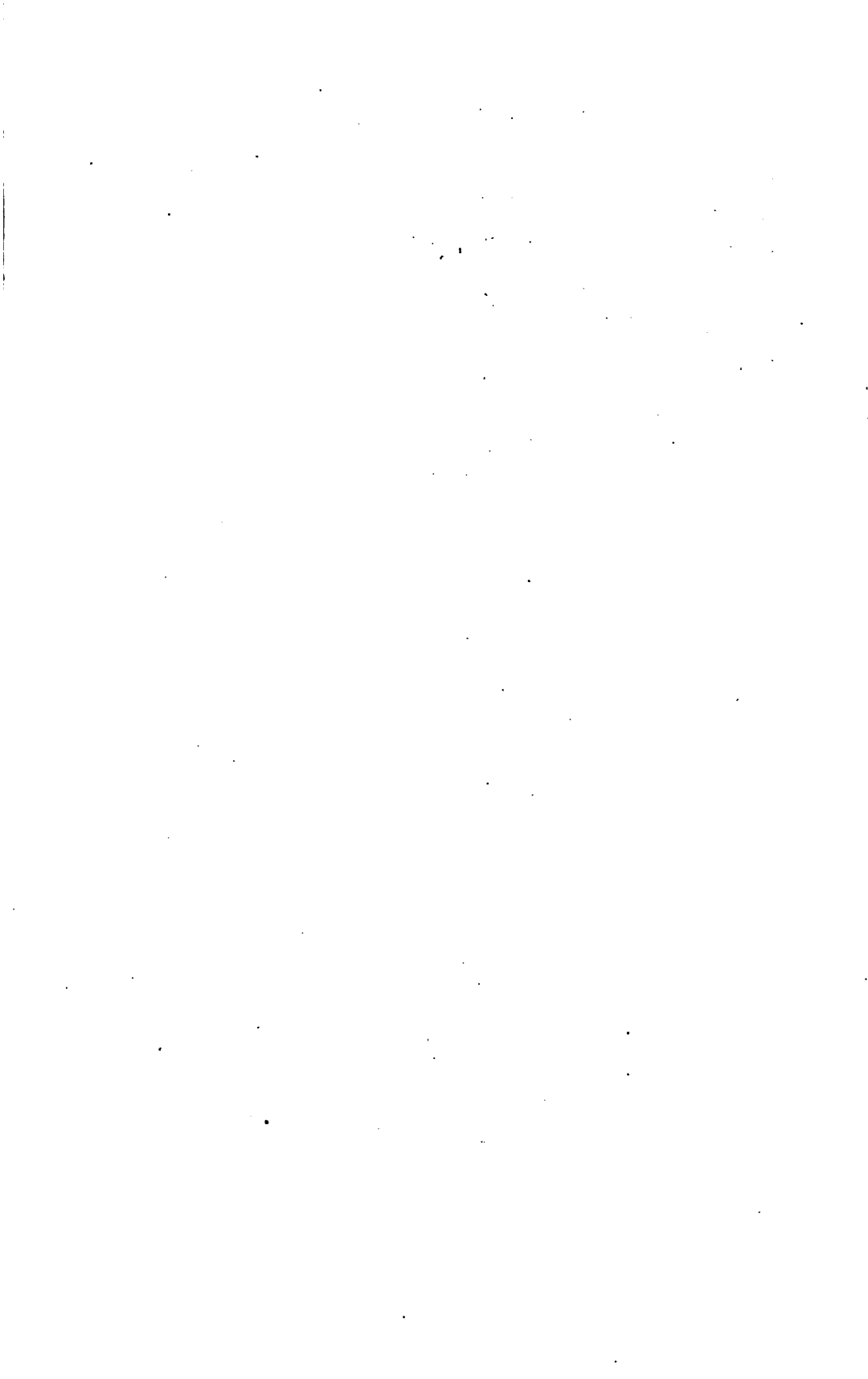
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Bostick & Seymour vs. Mepdenhall & Kitchell.
Boutté, C., Wife of, vs. Executor of Boutté, F. P., et al.
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Burnside, John, vs. Rotchford, Brown & Co.
Byrne, G. W., vs. Hibernia Bank.
Camors, J. B., & Co. vs. Losch, John J.
Carey, R., & Co., et al. vs. Price, Hine & Tupper.
Chaffé & Bell, Assigns, vs. Moore, D. R.
Citizens' Bank vs. Ducros, F. A.
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Couteau, E., et al. vs. Warren & Atkinson.
Crescent City Live-Stock Landing and Slaughter-House Company vs.
Larrieux, John.
DeGreck C., vs. Murphy & Gaines et al.
DeHaven & Sons vs. Simon, A.
De la Valina, J., vs. Fasnacht, S.
De St. Romes, Mrs. W. J. C., vs. Her Creditors.
Donnell, W. S., vs. Brigham, J. H., Curator.
Doyle, D. J., vs. Smith, M., and Husband.
Dunn, A. M., Administrator, vs. Bird, T. J., Sheriff, et al.
Edwards, D. & J. D., vs. Olmstead, L. J., et al.
Edwards, D. & J. D., et al., vs. Fairbank & Gilman.
Ehrenberg, Widow C. E., vs. Mr. and Mrs. Clarence et al.
Flash, Lewis & Co. vs. Adler & Goldman.
Gardiner, J., vs. Dezutter, S., et al.
Grant, John, vs. G. C. Sebastian.

Gregoire, D., vs. Judge Superior District Court.
Grellet, P., vs. Doullut, P.
Guilbeau, L., vs. Millard, E. M.
Hammond, S. W., vs. Ross, Peter.
Heath, Pippey & Lara vs. Herwig, E. F., et al.
Henry, J. B., Sr., vs. Duvic, C., et al.
Hibernia Bank vs. Watson, M.
Homer College, President, et al. vs. Calhoun, J. C.
Human, M., vs. Bladis, A.
Hunter, R. A., vs. Blackman, W. F.
Ivens, M., Jr. vs. Buckner, H. S.
Johnson, B., vs. Popovich, M., et al.
Johnson, Josephine, vs. Clark & Meader.
Johnson, T. C., vs. Weinstock, A.
Jones, C., vs. Henry, J.
Jurey & Harris vs. Hord, Mrs. M.
Klein & Co., John, vs. Herwig, E. F.
Lay, S. L., et al. vs. Wallace, C., et al.
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Letten, Mrs. Barbara, vs. Widow F. Arno.
Loan and Pledge Association, in the Matter of.
Macias, Widow B., vs. Anfoux, O.
Marchand, A., vs. Ogden, R. N.
Marcotte, S., vs. Messirk, W. R., et al.
Marbury, Wm., Jr., et al. and McLain, L. D., et al. vs. Pace, Jas. F.
Martinez, F. P., vs. Leiber & Mumme.
Martinez, F. P., vs. Estoup, J.
Marvins Safe Co. vs. Gauthreaux & Wright.
Margin, A., vs. Favre, Mrs. N.
Martin, D. B., vs. Foy, H. H.
McCarstle, C., vs. Chaney, J. J. B., et al.
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McGrath, J., vs. Houston, J. D.
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Mechanics' Society, in the Matter of.
Meyer, E., vs. Deffarge, G.
Meyer, Wels & Co. vs. Trousdale, E. A., et al.
Morgan City vs. Daly, Sophia.
Monroe, J. G., vs. Mrs. A. Gourde.
Montane vs. Saloy.
Nalle & Cammack vs. Terrel, W. P.
New Orleans City vs. Campbell, G. W.
New Orleans City vs. Reaud, Victor.

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- Ocean Dry Dock Co. vs. Stein, J. A., et al.
O'Donnell, C. J., vs. Durbridge, W., et al.
Ong, Thos., vs. Chubbuck, E. E., et al.
Parker, L., vs. Shropshire & Anderson.
Police Jury of the Parish of Jefferson vs. Labarre, F. J.
Pinard, H. T., vs. Miss M. M. George.
Powell, F. F., Administrator, vs. Garner, F. S.
Pradel, B., Sr., vs. Pradel, B., Jr.
Puzo, Paul, vs. Fouchy, V.
Ragan, J. C., vs. Falgout, L. F.
Ran, J., et al., vs. Lacoume, C., et al.
Ransom, W. A., & Co. vs. Scheene & Bradley.
Raymond, J., vs. Union National Bank et al.
Redwitz, H., vs. Waggaman, E., Sheriff, et al.
Richoux, A., vs. Mayer Bros.
Sarat, A. vs. Fernandez, F.
Schwartz, C., vs. Crescent City R. R. Co.
Shofield, W. D., vs. Cane, M. D. C., et al.
Segura, O., vs. Labit, J. T.
Sharp, W., vs. Gassie, A.
Semple, Reno & Cassilly vs. Thomas, A.
Société de Bienfaisance, etc., vs. Morris, W. B., & Co., et al.
Stoner, G. W., vs. Flournoy, A., Sheriff, et al.
State vs. Adrien Aveque et al.
State vs. Barnes, Samuel.
State vs. Colbert, Jno.
State vs. Fassman, H.
State vs. Going, Edward.
State vs. Harrison, Moses.
State vs. Robinson, Jo.
State vs. Remps, Wm., et al.
State ex rel. B. Barth vs. Judge of the Superior District Court.
State ex rel. J. R. Clay vs. Geo. B. Johnson, Auditor.
State ex rel. C. Dorlocourt vs. Judge Fourth District Court.
State ex rel. H. C. Dibble vs. Judge Superior District Court.
State ex rel. Miss Labarre vs. Judge Superior District Court.
State ex rel. J. Larieux vs. Judge Superior District Court.
State ex rel. J. Mather, Jr. vs. Board of Liquidators.
State ex rel. T. M. McClellan vs. Judge Sixth District Court.
State ex rel. W. B. Merchant vs. M. J. Thompson, State Engineer.
State ex rel. New York Guarantee and Indemnity Company vs. Board of Liquidators.
Succession of F. P. Boutté.
Succession of D. C. Byerly.

Succession of A. Constant.
 Succession of R. Crasto.
 Succession of J. A. Dichar, in the Matter of.
 Succession of M. M. Dowler.
 Succession of Philip Drumm.
 Succession of Charles M. Guilbeau.
 Succession L. F. Generis.
 Succession of F. Lacroix.
 Succession of E. Marsoudet vs. Mrs. M. Clancy et al.
 Succession of Mrs. M. O'Brien.
 Succession of J. C. Patrick.
 Succession of P. Pineaud vs. J. Fellon.
 Succession of Jean Salvant.
 Succession of Mrs. E. St. Armand.
 Succession of C. B. Thompson.
 Tauneret, E., vs. Merchants' Mutual Insurance Company.
 Tarnoir, John, vs. Weaver, D., et al.
 Todd, J. M., Liquidator, et al. vs. Morse, R. D.
 Tremoulet, O., vs. Sigur, Mrs. L. J., et al.
 Union Insurance Company vs. Mrs. Delphine Benit.
 Van Benthuyzen, N., vs. Wackerbath & Joseph.
 Voinche, A., vs. Voinche, A. A., Administrator.
 Walmsley, C. L., Administrator, vs. Walker, H. C., et al.
 Walmsley, W. E., vs. Robinson, G. W.
 Watson, F. V., vs. Bondurant, Mrs. E. F.
 Willis, J. W., vs. McVey, W. H., Sheriff, et al.
 Yarborough, G. W., Administrator, vs. Blanks, R. A.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
AT
NEW ORLEANS.

JANUARY, 1877.

JUDGES OF THE COURT:

HON. T. C. MANNING, <i>Chief Justice.</i>	
HON. R. H. MARR, '	}
HON. A. DEBLANC,	
HON. W. B. SPENCER,	
HON. W. B. EGAN,	
	<i>Associate Justices.</i>

No. 6437.

CHARLES LAFITTE VS. MORGAN MORGANS.

The State tax referred to in the act of 1872, which act forbids the police jury of any parish from assessing and collecting any tax exceeding the one hundred per centum of said State tax, is merely the tax levied by the Legislature to pay the public debt and provide for the general expenses of the government. It does not include the levee, school, and other taxes levied for special purposes.

Should the necessities of a parish demand the assessment of any larger tax, such tax must first be authorized by a vote of a majority of the voters of the parish.

APPEAL from the Parish Court of the parish of St. Charles. *Earhart, J. Breaux, Fenner & Hall*, for plaintiff and appellant. *N. St. Martin*, District Attorney *pro tempore* and Parish Attorney, and *James D. Augustin*, for defendant.

The opinion of the court was delivered by MANNING, C. J.

The tax collector of the parish of St. Charles was proceeding to sell the property of the plaintiff to enforce the payment of the parish tax for 1876, assessed upon plaintiff's property at the rate of fourteen and a half mills on the dollar, when plaintiff paid a portion thereof, viz.: the assessment of four mills on the dollar, equal to that levied for the general expenses of the State government and the school tax, and enjoined the collection of the residue upon various grounds, of which the first is that the police juries of the parishes are prohibited from

levying a tax for any parish purpose which shall exceed one hundred per centum of the State tax for that year, and that the State tax was only four mills on the dollar.

The law upon which the plaintiff relies to support that ground of injunction is the prohibition contained in the following section of the act of 1872:

"Nor shall the police jury of any parish levy a tax for any parish purpose, except to pay indebtedness incurred prior to the passage of this act, during any year which shall exceed one hundred per centum of the State tax for that year, unless such excess, whether levied by village, city, or parochial authorities, shall first be sanctioned by a vote of a majority of the voters of said village, city, or parish, at an election held for that purpose." Acts of 1872, p. 56.

In the revenue act of the previous year, which was in force in 1876, and governed the assessment for that year, it is enacted that "an annual *ad valorem* tax of four mills on each dollar of the valuation for each year of all the real and personal property in this State subject to taxation shall be assessed, levied, and collected in current money for the purpose of supporting the government of the State, of paying the public debt, and of promoting the public interest." Acts of 1871, p. 104.

The defendant denied that the assessment of fourteen and a half mills on the dollar by the police jury was in contravention of that law, inasmuch as that was the sum total of the State taxes for that year, and prayed a dissolution of the injunction with one hundred per centum upon the taxes enjoined as damages. The judgment was in his favor and in accordance with that prayer.

The tax of four mills on the dollar is for the purpose of supporting the government of the State, of paying the public debt, and of promoting the public interest. Other taxes are imposed under authority of special laws for special purposes; *e. g.*, one to protect the lands from overflow by the construction and repair of levees, another for the support of the public schools, a third to pay the interest of the public debt, etc., and these can not be diverted from the purpose to which they have severally been consecrated. If the tax of four mills on the dollar is deemed sufficient to defray the expenses of the State government, it may reasonably be inferred that the General Assembly deemed a similar tax adequate to the support of the parish government, and that the restriction imposed by the act of 1872 was intended to be measured by the rate of taxation authorized each year for the government of the State.

An old and sound rule for the construction of statutes is that inquiry must be made of the mischief to be remedied, and thus ascertain the motive which impelled the Legislature to enact the new law.

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Blackstone says: "The most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it, or the cause which moved the Legislature to enact it." 1 vol., 61, Com.

It is a part of the public history of the country that for several years immediately preceding the enactment of the statute we are considering the parochial authorities of many parishes had made lavish and wanton expenditures, and that practically their power to impose taxes was unlimited in their own opinion. It was exercised without restraint. The reports of this court exhibit to what extent this power was used and for what purposes. Manifestly that was the cause that moved the Legislature to enact this act restricting their power within specified limits.

The defendant insists that all of the taxes levied by authority of the State, viz., the levee tax, school tax, interest tax, the tax for the support of the State government, etc., are but one tax. This theory is necessary to sustain his argument that the expression "State tax" used in the statute means all the State taxes, but the fact is otherwise. The tax of four mills on the dollar for the expenses of the State government is imposed by the act of 1871; that for the payment of the interest on the public debt by an act of 1874, (Acts, p. 39) and that for the construction of levees by a later act of same year. *Idem*, p. 95.

The view we have taken of this meaning of the statute of 1872 is confirmed by other acts of the Legislature. In 1870 it was enacted that "neither police jurors nor other parish authorities shall make appropriations or expenditures for the purpose of making or repairing public roads or bridges until provision for the payment of such appropriations or expenditures shall have been made by levying a special tax on all the real and personal property in the parish, and payment shall not be made out of any other fund." Acts 1870, p. 47.

So again: "The electors of a district, when legally assembled, shall have power to levy such tax, not exceeding three mills on the dollar, to purchase or lease a school-house, and to build a school-house, and for compensation of teachers." Revised Statutes of 1870, section 1276.

The analogy between the power exercised by the General Assembly in imposing taxes for State purposes and that conferred by it upon the police juries for parochial purposes is complete. While a tax is imposed by it for the support of the State government, and provision is made by special laws for special purposes, so in like manner it restricts the police juries to a tax for the support of parochial government of one hundred per centum upon the sum or rate it has imposed for the State government, and empowers those bodies to levy special taxes for defined purposes. Nor has the Legislature omitted to provide for other and special

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contingencies. If an extraordinary emergency shall demand it, a higher rate of taxation is permitted to be levied if it "shall first be sanctioned by a vote of a majority of the voters at an election held for that purpose," and the power to levy a tax to pay indebtedness incurred prior to the passage of the act of 1872 is specially excepted from prohibition as to the rate specified therein.

The opinion we have expressed upon the ground of injunction just examined renders unnecessary a discussion of or decision upon the other grounds urged by plaintiff.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be avoided and reversed, and that the injunction be perpetuated, and the plaintiff have and recover of the defendant the costs of both courts.

Rehearing refused.

No. 6108.

ADOLPHE GAIDRY VS. G. LYONS, SHERIFF, ET AL.

Property which a debtor has conveyed to another by a *simulated* sale may be seized by a creditor, in whatever hands it may be found. In such case no preliminary revocatory action is necessary.

The conversations, and admissions of one of the parties to an alleged fraud, or simulation, are admissible in evidence, even though they have occurred out of the presence of the other parties.

Where fraud or simulation is at issue, any act of one of the parties to it, bearing on the issue, is relevant. In such cases a large latitude in the admission of evidence is not merely permitted, but enjoined.

A PPEAL from the Fifteenth Judicial District Court. *Beattie, J. N. H. Rightor* and *E. W. Blake*, for plaintiff and appellant. *Goode & Winder*, for defendants.

The opinion of the court was rendered by MANNING, C. J.

ON THE MOTION TO DISMISS.

The defendants and appellees move to dismiss this appeal on the grounds that there was no legal motion for an appeal made in the lower court, and no legal order of appeal granted.

The minutes of the court show that the motion was made in open court, and the order entered in form. The motion to dismiss is therefore refused.

ON THE MERITS.

This is an injunction obtained by plaintiff restraining the sheriff of the parish of Terrebonne, and Lap  ne & Ferr  , judgment creditors of Theodore Duplantis, from selling certain sugar and molasses seized by the sheriff under a writ of *feri facias* issued at the instance of those creditors.

29	4
52	986
29	4
104	85
29	4
113	276
29	4
118	483

Gaidry vs. Lyons.

The facts need to be detailed. On the sixteenth of February, 1870, Theodule Duplantis executed an act of mortgage to Lapène & Ferré to secure two notes of \$5847 35 and \$3500, in which his wife makes the usual renunciation. The property mortgaged is a sugar plantation composed of six tracts of land originally, each one of which is specifically described, with the engine, machinery, and buildings.

On the twenty-seventh of January, 1873, Lapène & Ferré instituted suit against Theodule Duplantis for \$11,156 76, subject to a credit of \$5774 32. This was on account, and it does not appear that either of the above notes was included in that suit.

Nine days after the filing of that suit, viz.: on February fifth following, Theodule Duplantis leased to his brother Marcel the six tracts of land described in the mortgage above recited, and sold him five other tracts. The lease was for three years, commencing with 1873, and the condition the payment of two thousand dollars per annum, for which notes were executed by Marcel.

On the sixteenth of May of the same year judgment was rendered in favor of Theodule Duplantis's wife against him for \$2175, with interest from the above date, and recognizing a mortgage in her favor, dissolving the community, etc.

On the twenty-fourth of the same month Theodule Duplantis conveyed by notarial act to his wife the six tracts of land mortgaged to Lapène & Ferré in 1870, and leased to Marcel three months before for \$3289 68, the wife paying by acknowledging satisfaction of her judgment, and assuming the payment of a mortgage note of her husband to one Barilleaux for \$1111 98. Marcel witnessed the act.

On the twenty-ninth of November of the same year Lapène & Ferré obtained judgment in their suit against Theodule Duplantis for \$2908 78 and interest.

On the twenty-second of December following Marcel Duplantis sublet to Adolphe Gaidry, the plaintiff, the property purchased by him from Theodule the previous February, and also the six tracts leased by him from his brother in the same act, which are the same tracts that his brother had sold to his wife in May, to which sale Marcel was a witness. This lease was for 1874 only, and the price was eight hundred dollars, to be paid early in the year.

It was not until the first of December, 1874, that execution was issued by Lapène & Ferré on their judgment, and four days thereafter Gaidry enjoined further proceedings, upon the ground that the property seized belonged to him, having been produced on the plantation of which he was lessee, and which was cultivated by him, and of which he was in possession at the time of seizure, both of plantation and produce.

The defendants, Lapène & Ferré, deny this, and aver that their debtor,

Theodule Duplantis, was in possession of the plantation that year, and had been for thirteen years continuously, and was also in possession of the produce seized; that the lease of the plaintiff from Marcel Duplantis, as well as that of Marcel from their debtor, was a "sham and a myth," and the whole transactions of these parties were simulations contrived for the purpose of defeating the claims of the defendants against the owner of the plantation; that the crop of 1874 was made by that owner, Theodule Duplantis, and belonged to him, a portion of the advances necessary to make it having been furnished by Gaidry; that Theodule was insolvent or greatly embarrassed when the pretended lease was made by him to his brother, and was in no better condition when the brother sublet to Gaidry, and is insolvent now; and his condition was well known both to Marcel and Gaidry; that these leases had no real existence, but were simulated contrivances made by these three parties to obstruct defendants in the pursuit of one of them who was their debtor.

Before entering upon an analysis of the evidence, it will be convenient to dispose of a point made by the plaintiff and insisted on by him with pertinacity, viz.: that the defendants can not attack the lease of Gaidry from Marcel Duplantis in this manner, but are obliged to resort to a direct action to annul it, much less can they seize property claimed under that lease as Gaidry's to satisfy a judgment against another person, when the title to that property was unassailed at the time of seizure, and that the burden of proof rests upon the party charging simulation in that case. In support of this position great reliance is placed upon the case of *Pierce vs. Clark*, 25 An. 111, wherein the following language is used: "It is the well-settled jurisprudence of this court that the title to property can not be attacked collaterally, and that where a judgment creditor seizes property as belonging to the judgment debtor, but the title to which stands in the name of another, he assumes the burden of showing simulation."

The doctrine is stated too broadly, and requires modification. The *actio Pauliana* of the Roman law, which is our revocatory action, is to set aside contracts which have a real existence, but which the law will not permit to impede the creditor in recovering his debt, and is quite distinct from that of which the object is to have a simulated sale decreed such. A simulated transfer of property vests no right in the transferee, and is not subject to the rules of real contracts operating injuriously to creditors, who may proceed as if no such transfer had been made, and if enjoined may plead and show the simulation on the trial of the injunction. That is the doctrine enunciated in the earliest of our reports, and maintained by a long line of decisions. In one it is declared that "where the sale is purely simulated and fictitious, and when the party remains in possession, the burden of proof is upon the party claiming title to

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show that the sale is *bona fide* or real." *Haile vs. Brewster*, 13 An. 155. It had already been held that "simulation gives neither possession nor title, and that no act of the parties to a simulated sale can be recognized as affecting the rights of creditors to the property of their debtor." *Cammack vs. Watson*, 1 An. 132; *Hobgood vs. Brown*, 2 An. 323. Again it is said: "The judgment creditor is not bound to resort to a revocatory action before seizing property which he believes to belong to his debtor, and to be held by a third person under a simulated sale." *Clark vs. Bank of Alabama*, 3 An. 325.

"It is the continued possession of the vendor, acting as owner after the sale, which creates the presumption of simulation and imposes upon the vendee, as regards third persons, the burden of proving the validity of the sale." *Lindeman vs. Theobalds*, 2 An. 912.

"The chapter of the Civil Code regulating the revocatory action is not applicable to cases of simulation. In these latter the sheriff may seize notwithstanding the apparent transfer of the property by the defendant in execution." *Enswiler vs. Burnham*, 6 An. 710.

"A simulated title confers no right whatever. No action is necessary to annul it." *McMartens vs. Place*, 8 An. 431.

And in a recent case it was held that "real property in possession of a party under a recorded title translatif of property can not be seized by a judgment creditor of the former owner unless it be shown that the sale was simulated." *Anderson vs. Hoy*, 23 An. 175.

Several bills of exception were taken by the plaintiff to the testimony. The first to the ruling of the court permitting Theodule Duplantis to testify as to the real ownership of the property seized, the objection being that he was estopped by his "declaration that it was Gaidry's," made in his application to bond it. The law of estoppel does not apply here. A man may vary or contradict his own testimony. That will impair or destroy his credibility, but it is competent to hear it. The second bill is to the ruling of the court permitting the same party to testify as to the motives which induced him to lease his plantation to his brother, the objection being that such evidence was inadmissible until the lease was produced. The lease was introduced in evidence during the trial. It would have been more regular, however, to have laid the basis for the evidence by first offering the lease. The third bill was to the proof of declarations of Theodule Duplantis concerning the plaintiff testified to by Smith, on the ground that they were hearsay. The evidence was admissible. "Conversations or admissions of the parties implicated in the fraud or simulation may be offered by creditors, the objection to such evidence going to the effect or weight of it when the declarations are not made in the presence of the other party." *Davis vs. Steon*, 15 An. 177.

The defendants take a bill to the testimony of Surle, on the ground of

its irrelevancy. It was relevant as tending to show the action of Theodule, the owner, to his merchant during 1873, one of the years of the lease pretended to have been made to Marcel. "The whole tendency of modern practice is to enlarge the admissibility of evidence, leaving the court to restrict its applicability." *Kaiser vs. New Orleans*, 17 An. 178.

We have now to collate the oral testimony. It will be abbreviated as much as consists with a proper presentation of its material features.

The record reeks with fraud and perjury. Two brothers combine to evade the payment of a debt acknowledged, or proved to be justly due. If the testimony of the one be true, that of the other is necessarily false. The forms of law are carefully observed, behind which they attempt to hide their guilty purpose. Solemn declarations in authentic acts, and judicial admissions upon the records of courts, throw a veil over the secret intention imbedded beneath this crust of formularies. The law rends this veil asunder with its rude and unsparing hand, and beneficently throws over society its protecting shield. Simulation is difficult to be proved. They who practice it conceal their devices under the guise of acts which bear the stamp of authenticity, and have the outward appearance of fair dealing. The sinuous paths which they tread require to be illumined by the light of truth, poured upon it with merciless brilliancy. The law wisely permits great latitude in the application of the process by which this truth is to be eliminated. Conscience can be probed. The worst deformity thus exposed will revolt an individual observer, but society reaps the benefit of the detection in wrongdoing, and the law vindicates its mission.

Theodule Duplantis swears that the lease of his plantation to his brother Marcel, in February, 1873, for three years, was a "mere arrangement for convenience," and the three rent notes of two thousand dollars each were returned by him to Marcel, he not receiving, or at any time expecting to receive, any money therefor; that he has lived on the place continuously since 1861 and lives there now, and has cultivated it all the while for his own account; that the supplies and advances for the plantation during 1873 were covered by a mortgage note of his delivered to Surle, who furnished them; that when Marcel became apprehensive that his own creditors would give them trouble, he sublet to the plaintiff for 1874, and gave as a reason for it that Letchford had obtained judgment against him and might interfere with witness in the management of his affairs; that witness assented to this arrangement because it was his interest that such transfer should be made if there was a probability of Marcel's creditors interfering, provided the transfer was made on the same conditions as his lease to Marcel; *i. e.*, without consideration and for convenience only; that the plaintiff, Gaidry, knew all this; that Marcel feared Letchford would seize the mules, and he

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therefore sold them to plaintiff, who paid Marcel four hundred and twenty-five dollars cash, and then Marcel handed back the money to plaintiff in witness's presence, the intention being to simulate a sale only; that during 1874 he cultivated the plantation for himself, and the plaintiff made him part of the advances and others a part—Labat to the amount of \$784 75 and LeBlanc \$169—both of which sums were paid by witness with his own funds or produce; that he bought peas, corn, and fodder from nine persons whose names are mentioned by him and paid them himself, and also paid six named laborers; that part of the land worked that year, leased to Marcel and sublet to plaintiff, was held by witness under a lease from Mrs. Forest, and witness paid her the rent; that he paid the cooper, bought carts for the place, and paid for one and is to pay for the other, killed his own beeves for the laborers, and in all respects acted as owner, both of land and crop, which were his own; that he marked the sugar and molasses seized with plaintiff's initials, because he intended it should be shipped by him and the net proceeds applied to the payment of plaintiff's account against him for supplies; that this produce was in witness's possession at the time of seizure; other barrels and hogsheads were marked with names of other persons for whom those were intended in like manner as those marked for plaintiff; some of the Gaidry marks were effaced, and the barrels, etc., were re-marked in Daspit's name and others, and these changes were reported to plaintiff and approved by him. He denies that he engaged to serve as overseer for plaintiff, and explicitly confesses that his disclaimer of ownership of the produce, made in the application to bond it, was false. His plantation is now under seizure by Lapène & Ferré to satisfy the mortgage of 1870.

Labat confirms the statement relative to the supplies furnished by him to Theodule Duplantis and the payment of the account by the latter, and LeBlanc does likewise. LeBlanc lives in the neighborhood, and had accounts against some of the laborers, which Theodule told him to transfer to his account, and he paid it; but this payment was made in part by drafts on plaintiff. Lecompte, Ozio, Hebert, and Forest all sold forage to Theodule that year and were paid by him. The last mentioned knows that Theodule paid the rent money to Mrs. Forest, as narrated by him. Some of the laborers testify they were employed and paid by Theodule. In June, 1874, Smith was at the latter's residence on the plantation and was shown by him an account of the plaintiff's for supplies, and he complained of plaintiff's exorbitant charges for oats, flour, etc., and declared he would not submit to such prices, and would cut grass and cure it and thus save expenses for forage, and other witnesses say that he did as he then declared he would do.

Marcel Duplantis swears, on the other hand, that his lease from his

brother and his sublease to plaintiff were genuine, and that the price of the latter was paid to him by plaintiff; that the purpose of the parties was to deposit the three rent notes of two thousand dollars each with Surle as collaterals for advances, but that it was not done, and himself made the advances; that the expenses of 1873 were seventy-five hundred dollars, of which Surle furnished twenty-five hundred dollars, and witness used his own money for the residue, and that he received twenty-eight hundred dollars, of which plaintiff paid him eight hundred dollars, and the balance was the proceeds of the sale of mules and carts. "Upon his soul and conscience," he exclaims, "he is sure the sugar and molasses ought to belong to Gaidry" (plaintiff), and immediately adds, "he may, perhaps, be deceived." He swears that his brother Theodule engaged to serve as overseer to plaintiff as vehemently as the other swears to the contrary, and fixes the time of that engagement at May, 1874. He had transactions with plaintiff during that year amounting to \$1300 or \$1400, and on being asked why he did not pay this indebtedness in part with plaintiff's rent note answers, "*c'était mon affaire*"—he has always thought plaintiff an honorable man, and never warned his brother Theodule to be on his guard against him. Then, being shown a letter, says it was written by himself. This letter is addressed to his brother, and is dated the ninth of January, 1874, two weeks after his lease to Gaidry. After informing him that he had written him two letters since yesterday the letter proceeds: "*Vient, comme je te dis, soit sure de toute arrangement, mais comme je vois tous se trouver postiche suivant ce que j'aurais à te dire. Tu as le temps, je pense; vient, et de là tu pouvais voir avec ce que je te dirais; ne te fie pas à Louis Surle, ni même Adolphe dans rien. C'est pourquoi je t'écris ainsi. Je pense que cela suffit pour que tu sache à quoi t'en tenir.*"

"Tout à toi,

M. DUPLANTIS.

"P. S. A. G. m'a dit, hier, qui fallait je lui trouve l'argent."

Then being questioned as to whom he referred by the initials A. G., he does not recollect. Questioned further as to whom he referred by the name Adolphe, he does not know. Then immediately after he says A. G. and Adolphe refer to the same person, but does not designate the person.

Clay Duplantis, a nephew and employee of the plaintiff, testifies to an arrangement between Theodule Duplantis and the plaintiff, by which the former was to become the overseer of the latter at one hundred and fifty dollars per month till October of 1874, but on plaintiff during the conversation objecting to the salary Theodule agreed to take his pay out of the profits after all expenses were paid.

Justin Daspit, a brother-in-law of plaintiff, gives much the same testimony.

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Surle advanced for the cultivation of the crop of 1873, to secure payment of which Theodule deposited with him mortgage notes for six thousand dollars as collateral.

Last we will epitomize the testimony of Gaidry, the plaintiff. He was in possession of the plantation from the moment of Marcel's lease to him, and made the crop of 1874; the advances to make the crop were made by him; Theodule was his manager; paid Marcel eight hundred dollars, the consideration of his lease, and two thousand dollars cash for mules and agricultural implements; don't know how much his lessor was to pay for his lease from Theodule, nor how many hands worked on the place; didn't know the crop was liable to seizure by Marcel's lessor; sent all supplies and moneys from his store, twenty miles distant; there was no agreement with Theodule about salary, which was entirely left to witness; Theodule came to him to be employed as overseer about February, 1874.

Groping through this mass of contradictions and prevarications we find certain salient facts established. Theodule Duplantis was insolvent at the time of the lease from him to his brother Marcel, and the subsequent sublease to their cousin, Adolphe Gaidry, and the seizure of the produce by Lapène & Ferré. The mortgage of 1870 to these last is unpaid, and his plantation is now under seizure for its satisfaction. The judgment in his wife's favor in May, 1874, could only have been rendered on proof of the derangement of his affairs. The suit of Lapène & Ferré in January, 1873, was for the recovery of another debt in addition to that secured by mortgage. Scarcely had the sheriff served the process in this suit upon Theodule Duplantis when he makes a lease for three years to Marcel, for which no consideration was ever paid. This lease was a simulation, and was not intended by either of the parties to have a real existence, but was expressly designed to obstruct the creditors of the lessor in the prosecution of their claims. The customary suit of the wife followed in quick succession. Before the expiration of the first year Marcel needed the same protection from his own creditors, and his lease to the plaintiff had the same purpose as the other, and like it was a simulation. The continued possession of the debtor of the property, his management and control of it, his payment of many of the expenses incurred in its cultivation with his own funds, or the produce he raised, and the pledge of his mortgage notes as collaterals to the merchant who supplied and advanced him for the crop of 1873, and his purchase of some of the supplies from the plaintiff for that of 1874, and his complaints of the prices charged are circumstances that show the character of the arrangement, and its purpose. Undoubtedly the plaintiff furnished a considerable part of the supplies and advances for the crop of 1874. Were he before us prosecuting a

demand for their payment with a recorded privilege, he would doubtless have established his right to a judgment in his capacity of furnisher of supplies. He has chosen a different course. Relying upon a simulated lease, he claims the produce as owner, and imagined that authentic acts, containing illegal and fraudulent combinations to defraud creditors, could not be torn to shreds by the sharp talons of the law, when it scents fraud and deceitful devices.

The judge who tried the case evinces in an elaborate and well-considered opinion his patient and careful examination of the whole evidence, and the law applicable to it. He has rightly interpreted the one, and has duly weighed the other. He had the witnesses before him, and saw the manner of giving their testimony. His judgment was that plaintiff's injunction be dissolved with twenty per centum upon the amount enjoined, as general damages, and three hundred dollars attorney's fee as special damages, decreeing the produce seized to be the property of Theodule Duplantis, the judgment debtor, and subject to the execution of Lapène & Ferré, the judgment creditor, and annulling the several leases, and declaring them to be simulations.

The judgment is just.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be and it is hereby affirmed with costs of both courts.

ON REHEARING.

DEBLANC, J. Adolphe Gaidry prays for a rehearing of this case on the grounds:

First—That, as his title springs from a recorded lease, it can be assailed only by a direct action.

Second—The testimony of Surle and Daspit has a tendency to create a doubt as to the simulated character of the transaction between him and Duplantis, and that doubt should be construed in favor of honesty and fair dealing.

Third—That with no degree of certainty has any fraudulent intent been traced to him in the matter of that lease.

We have carefully re-examined this case and our decree; we have once more read and considered the evidence and the law, and our former opinion stands unremoved, unshaken. Of the grounds urged by plaintiff not one is supported by either evidence, law, equity, or the authorities on which he relies.

The obvious distinction between a revocable and a simulated contract has been for upward of fifty years recognized in our jurisprudence, and applied by the tribunals of the State. To revoke a real contract, however illegal it may be, one must proceed by a direct action; and why?

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Because such a contract does exist, and can not be treated and set aside as an absolute nullity. That which has but the empty form and not the substance of a contract—that which never had any real and legal existence—is, and may be declared a nullity, either in a direct action or otherwise. H. D., p. 1031, No. 1.

In this case, what is the salient fact? Adolphe Gaidry willingly and knowingly became an accomplice—not in a mere act of preference in favor of a favorite creditor—but in a gross, unjustifiable, and ill-disguised fraud, in a bold and manifest simulation. The transparent veil thrown over it has been raised by their own hands, and we are told that in this instance, in this action, we are without authority to check its course, and to defeat its purpose.

Our mission is not to excuse or encourage fraud, but to eradicate and discourage it, and little do we care that the act which conceals it bears the signature of a public officer, and that it was recorded. We would be guilty of a strange breach of our trust if we did not dare look behind the signature and the certificate of an officer, to detect and strike down a fraud and a simulation.

Gaidry now appeals to us to mitigate what he calls his loss, by reversing that part of the decree of the lower court awarding damages against him. This we are not inclined to do. As to him—to his claim for advances—no fraud was necessary. He chose to coalesce with dishonest debtors, and to link his claim with dishonest pretensions, and he suffers by his own fault—his indisputable complicity.

The rehearing is refused.

No. 5335.

UNION WOOD PRESERVING COMPANY VS. W. H. BELL.

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The Superior District Court has not jurisdiction of a case to which a corporation is a party, except when the corporation has been organized under a special act of the Legislature.

APPPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. George W. Christy*, for plaintiffs and appellees. *Lacey & Butler*, for defendants.

The opinion of the court was delivered by DEBLANC, J.

This suit was filed in the Superior District Court for the parish of Orleans on the fourteenth of January, 1874, by the Union Wood Preserving Company against William H. Bell, to recover the first, second, and third installments alleged to be due by him on seventy-five shares of the capital stock of said company.

The Union Wood Preserving Company was dissolved after the institution of this suit, and the commissioners appointed to liquidate its affairs

filed an appearance in said suit and adopted as theirs the prayer of the original petition.

On the seventh of February, 1874, defendant answered to plaintiff's demand, and on the twenty-fourth of April filed an exception in which he contends that "the Superior District Court was without jurisdiction to hear and determine said cause, for the reason that the Union Wood Preserving Company has not been established by act of the General Assembly of the State of Louisiana."

The Superior District Court is in reality but the continuation under another name of the Eighth District Court. Its jurisdiction before the repeal of its previous title was general as to certain cases, exclusive as to others. Under its new title its jurisdiction is limited and exclusive. It embraces, among other and specified cases, those "in which any corporation established by act of the General Assembly and domiciled in the parish of Orleans shall be a party."

The seventh section of the act changing the title of said court directs that "all suits and proceedings, and the records thereof, now depending in said Eighth District Court which are not by the provisions of this act transferred to the Superior District Court, are hereby transferred to the Fifth District Court for the parish of Orleans."

The jurisdiction of said court is clearly defined; the cases which it can hear and determine are specially mentioned; and as to all others it is entirely divested of jurisdiction. It was so divested not merely by the repeal of the law under which it exercised a general jurisdiction, but by the provisions in the aforesaid act, which direct "the transfer to the Fifth District Court of suits and proceedings then pending in the Eighth District Court and which no longer appertained to its exclusive jurisdiction after it was called the Superior District Court."

The Union Wood Preserving Company was a corporation, but was it a corporation established by act of the General Assembly? It was not so established, but formed by notarial act under the law providing for the organization of certain corporations in the State of Louisiana, and defendant's exception must prevail.

There was no reason, it seems, to distinguish between a corporation formed by notarial act, and under the general law, and one established by a special act of the Legislature; but, howsoever unreasonable it may be, that distinction is made; for the statute not only mentions the cases transferred to and to be filed in said court, but expressly transfers and excludes all others from its jurisdiction.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be and it is hereby annulled, avoided, and reversed, and plaintiff's action dismissed as in case of nonsuit at his costs in both courts.

Reihl vs. Martin.

No. 5018.

J. B. REIHL vs. L. L. MARTIN, ADMINISTRATOR.

In no case can a widow, or the estate of a wife, be held for more than one-half of a community debt, and not even for that much unless the widow or her heirs have accepted the community.

The written acknowledgment of a debt by an administrator will not bind the succession if such debt does not really exist.

A PPEAL from the Parish Court, parish of Lafourche. *Knobloch, J. Louis Guion*, for plaintiff and appellee. *E. W. Blake and L. S. Allain*, for defendant.

The opinion of the court was delivered by SPENCER, J.

Plaintiff took a rule on defendant in the parish court of Lafourche, in which he alleges that on the seventh of December, 1872, he obtained in the district court of said parish a final judgment against said Martin personally for \$1479 04.

"That the said Louis Martin is the duly-qualified administrator of the succession of Scholastic Babin, his wife, whose succession was duly opened in said parish on or about the twenty-eighth of June, 1871, and as head of the community existing between him and his said wife he is responsible for the payment of the said claim, which is a claim existing against said community, and has been duly acknowledged by the said administrator as a just debt against the succession of his said wife; that said amount still remains unpaid, and that there is property of the succession which should be sold to pay the same. Wherefore petitioner prays that the said Louis Martin, administrator, be cited to answer this demand within ten days; that after due delay the property of said succession be sold to an amount sufficient to pay the sum due in principal, interest, and costs."

On this application the judge ordered that the administrator pay the amount claimed within ten days or show cause why the property of the succession should not be sold as prayed for.

A citation issued, directed to Louis Martin, and was, with a copy of the rule, served on him personally on the twenty-seventh of February, 1873.

On the seventh of July, 1873, the parish court met in regular session. On the same day, without default, the rule was fixed for trial, tried, and judgment final rendered in favor of plaintiff, ordering "by reason of the law and evidence being in favor of plaintiff and against defendant in his capacity as administrator" that the property of the estate of Scholastic Babin be sold to satisfy and pay plaintiff's demand in principal, interest, and costs.

If any evidence was introduced by plaintiff no note thereof was

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taken in writing, but there is found in the record a copy of the plaintiff's judgment against Louis Martin, upon which he bases the present suit.

On that judgment appears the following indorsement:

"The within judgment is hereby recognized as a debt against the succession of Scholastic Babin, deceased wife of L. Martin.

"Thibodaux, February 20, 1873.

"(Signed)

L. S. ALLAIN,

"Attorney for L. Martin, Administrator."

From the judgment decreeing the sale of the property of the estate of Babin the administrator prosecutes this appeal, and urges its reversal on the following grounds:

That the debt was one personal to Martin and nowise connected with the community; that the judgment against the wife's estate was rendered without citation; that the debt was not actionable for want of previous presentation to the administrator. C. P. 984. That there is no proof that the administrator accepted said judgment as a debt against his wife's estate; that there was no judgment by default taken against the administrator, and no evidence was offered to sustain the judgment.

Under the view the court takes of this case, it is not necessary to pass upon these objections. Taking the plaintiff's case as stated by his petition or rule, and supposing him to have proved all he alleges, the judgment appealed from can not be sustained. He alleges that the debt evidenced by the judgment against the husband was a debt of the community existing between him and his deceased wife Scholastic Babin; that the husband as administrator had recognized it as a debt of the wife's estate, and that the property of her succession should be sold to pay it.

We know no law that makes the wife's estate liable for the whole of a community debt. She nor her estate is liable for any part of it, unless she or her heirs have accepted the community, and then only for one-half of it. Plaintiff does not allege or pretend that there has been such acceptance, either by herself, her heirs, or even by her administrator, if her administrator had such power. He does not allege that the property sought to be sold is community. On the contrary, he alleges that it is the wife's property and in the possession of her succession. Under these allegations and admissions the order of the court directing the sale of the wife's estate is clearly illegal, and the acknowledgment of the claim as a debt of her estate, whether made by the administrator himself or his attorney, is equally illegal. An administrator may acknowledge the existence of a debt, but his acknowledgment can not create one. This view renders it unnecessary to pass upon the power of an attorney-at-law, simply as such, to acknowledge a debt,

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a power which, however, we do not think flows from his capacity as attorney-at-law, acting extra judicially.

In these views we put the plaintiff's case in its strongest light by supposing him to have proved what he alleges. But the record does not show that he proved one single allegation of his petition. His counsel says the court must *presume* that he proved what he alleges, since the judgment recites that it was rendered "by reason of the law and evidence." It is a sufficient answer to this to say that in probate matters the law (C. P. 1042) requires the evidence to be reduced to writing. This court has repeatedly held that in probate matters the law imperatively requires that this note of evidence shall be made, and that its absence is of itself sufficient cause to remand this case. See 16 L. 200, Thompson vs. Benjamin, and same pages 202-3, Graham's Heirs vs. Graham's Administrator.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed, and that this case be remanded to the lower court, to be proceeded with according to law, plaintiff and appellee paying the costs of appeal.

No. 5338.

J. M. SERRA & HIJO VS. HOFFMAN & Co.

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44	786

Under the bankrupt act the assignee of any bankrupt is authorized to become a party to any suit pending in a State court either for or against the bankrupt, but he can not be compelled to become a party to such suit by any order of court. A party sued in a State court who has been adjudicated a bankrupt may ask for and obtain a stay of proceedings until his application for a discharge has been passed on. If he has obtained a final discharge he may plead it in bar of all claims from which such a discharge liberates him. If, however, he fails to plead his adjudication or discharge in the lower court, that court will adjudicate the case without regard to such facts.

That clause in the bankrupt act which provides that a creditor who has sued a bankrupt before his bankruptcy in a State court can only go on with his suit (if the defendant pleads his adjudication or discharge) by permission of the bankrupt court, only applies to courts of original jurisdiction, in which pleas in bar may be filed. It does not apply to this court, whose jurisdiction of a case is not in anywise affected by that clause.

The assignee of a bankrupt can not intervene in a suit in which the bankrupt is sued, and set up either the latter's adjudication or discharge in bankruptcy as a ground for staying proceedings, or in bar of the action. That is a right personal to the bankrupt.

A plea of adjudication or discharge in bankruptcy can not be originally set up in this court. Such plea must be expressly made in the court below, else this court will refuse to take cognizance of them.

A PPEAL from the Fifth District Court, parish of Orleans. *Cullom, J.*
Trial by jury. *George L. Bright*, for plaintiffs and appellees. *Hudson & Fearn*, for defendants.

The opinion of the court was delivered by *MARR, J.*

On the twentieth of June, 1874, *Hoffman & Co.*, defendants in the court

below, took a suspensive appeal from a final judgment rendered against them. The appeal was returnable on the first Monday of November, and the transcript was filed in this court on the fourth of September, 1874.

On the twenty-ninth of March, 1876, pending this appeal, counsel for appellees, suggesting that appellants had been adjudged bankrupts since the appeal was taken, and that W. E. Bertus had been appointed assignee, moved the court to order that the assignee be made a party, and that he be notified, and a copy of the motion and order was served on him.

On the twenty-ninth of December, 1876, the appellants filed in this court a plea setting out their final discharge in bankruptcy, which appears to have been granted on the ninth of March, 1876, and to re-date back to the fourteenth of October, 1874, as the date of the filing of their petition. The plea concludes with a prayer for leave to file it together with the certificate of discharge.

The assignee took no notice whatever of the order of the court that he be made a party, and, as his counsel, who were also the counsel for appellants in the court below and in this court, inform us in their printed brief, he "has made no appearance in this court except by counsel on the hearing of the appeal, and he now asks that all further proceedings in this court be perpetually stayed."

We do not find anything in the bankrupt act which requires the assignee, or which authorizes any court to compel him, to become a party to a suit brought by or against the bankrupt. It is true that all the estate, real and personal, of the bankrupt is conveyed to the assignee, and the legal title vests in him. It is his duty to obtain possession of all the property and effects of the bankrupt not exempt by law, and to resort to such proceedings as may be requisite for that purpose; and this he is authorized to do by the express terms of the act as well as in virtue of the title conveyed to him as assignee. The assignee, however, must use his own discretion with respect to suits pending in which the bankrupt is a party. The language of section fourteen of the bankrupt act (section 5047 of the Revised Statutes) is that he *may* prosecute and defend such suits in the same manner and with like effect as they might have been prosecuted or defended by the bankrupt.

And so it is provided by section sixteen, Revised Statutes, section 5047, that "if at the time of the commencement of proceedings in bankruptcy an action is pending in the name of the debtor (the bankrupt) for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall, *if he requires it*, be admitted to prosecute the action in his own name, in a like manner and in the like effect as if it had been originally commenced by him."

It is not part of the business of the assignee to protect the bankrupt,

and it would not be proper for him to tax the estate with the costs and expense of a litigation from which no benefit could result to the estate.

If a suit is pending against a bankrupt for the recovery of property, or in which some right or lien is claimed upon property which ought to pass to the assignee by the assignment, it would be his duty to intervene, if it should become necessary for him to do so in order to protect that property, as it would be his duty to intervene and prosecute a suit if it should become necessary for him to do so in order to recover any property or right of the bankrupt which ought to enter into and form part of the estate in bankruptcy.

But where the assignee is satisfied that nothing is to be gained for the estate by defending or prosecuting such suit, his duty requires him to take no part in the litigation; and to leave it to be disposed of between the parties, without interference by him.

What the law thus *permits* and *enables* the assignee to do, in the exercise of a sound discretion, it nowhere *commands* him to do, and if he does not choose to become a party voluntarily to a suit pending in the name of the bankrupt, we do not think that any court in which such suit may be pending, has the power or authority to make him a party or to compel him to submit to its jurisdiction and control.

The order of this court that the assignee be made a party did not, we think, have that effect. The service of a copy of that order gave him notice of the proceeding, however, and afforded him an opportunity to exercise his discretion and choice either to become a party, or to refrain from doing so, as he might determine the interest of the estate required.

There is a wide difference between the effect of the death, and the effect of the bankruptcy of a party to a suit. Death puts an end to all judicial proceedings in the name of the deceased; and no steps can be taken until his proper legal representative is made a party in his stead. Bankruptcy vests in the assignee the right to prosecute the suits in which the bankrupt is the actor, where the thing sued for might or ought to pass to the assignee by the assignment, and the defendant in such suit may protect himself against further prosecution by the bankrupt, by proper pleading and proof of the adjudication and assignment. But this is not because the bankrupt is *civilliter mortuus*. Nothing in the law gives any such effect to the bankruptcy. It is simply because the property, rights, and credits of the bankrupt have passed from him and are vested in the assignee; and the bankrupt has no right to recover that which does not belong to him, just as the case would be with any other person whose right and title in and to the thing sued for have been divested *pendente lite*.

Where the bankrupt is defendant in the suit, his capacity to stand in

judgment is in no manner impaired. The adjudication arms him with the means of protection, and gives him the right to demand that the proceeding against him be stayed, and that he be allowed a reasonable time to obtain his discharge. When he obtains the discharge he may plead and exhibit it as a full and complete bar to the suit, so that no judgment can be rendered against him if the debt be not one of those excepted by law from its operation.

Suppose, however, the defendant does not choose to demand a stay of proceedings; or, having obtained a discharge, that he neglects to plead it; certainly the court in which the suit is pending will not take cognizance of the proceedings in bankruptcy not brought to its notice by proper pleading, nor undertake to give the defendant the benefit of a stay or of a bar which he does not choose to avail himself of. A court having once acquired jurisdiction of the parties and of the cause, must proceed to determine the issues between them in the regular performance of its judicial duty, and an adjudication or a discharge in bankruptcy not pleaded, can have no more effect on the judicial action of the court than a payment, or release, or any other bar not brought within the judicial cognizance of the court by the defendant.

The counsel for appellants seem to think that a court in which a suit is pending against a bankrupt must have leave of the court in bankruptcy in order to proceed in the cause, and they cite a portion of section twenty-one of the bankrupt act, (Revised Statutes, section 5106,) which is as follows: "If the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy; but execution shall be stayed."

It is obvious from the mere reading of this section that it is applicable to courts of original jurisdiction alone; to courts in which pleas in bar can be received and passed upon; to courts which enforce their judgments by execution; and the counsel err in applying it to an appellate tribunal which reviews the judgments of inferior courts only upon the certified transcript of the record and proceedings in such courts, which has no power to receive and pass upon pleas and defenses not set up in the inferior court, and which does not attempt to enforce its decrees by execution.

The State courts do not exercise their powers by leave of the bankrupt court. They depend for their authority and jurisdiction on the organic and statute laws of the State. Where a suit is pending in a State court, and the defendant, having been adjudicated a bankrupt, demands a stay of proceedings to enable him to obtain and plead his discharge, the plaintiff may apply to the bankrupt court for leave to prosecute his suit to judgment in order to fix the amount due him which is in dispute;

but if he should attempt to enforce that judgment by execution, he might be stopped by the injunction of the bankrupt court.

The bankrupt court does not attempt to enjoin the State court; nor does it pretend to give the State court permission to exercise its functions. The State courts stay proceedings because they are required to do so by the paramount law, and they receive and give effect to the discharge as a complete bar for the same reason. The bankrupt court may deal with and control the plaintiff; in a proper case it would grant him leave to prosecute his suit to judgment, and in a proper case it would forbid him to enforce that judgment by execution, or otherwise than against the estate in bankruptcy. Where the plaintiff obtains leave of the bankrupt court to proceed, the State court may go on and render judgment, because the law authorizes it to do so, and it is to be presumed that the State court would, in obedience to the same law, stay or refuse to allow execution on the judgment thus obtained, or quash it if issued inadvertently.

In *Eyster vs. Gaff*, 91 U. S. (1 Otto) 521, a suit was brought to foreclose a mortgage, and the decree was rendered on the first of July, 1870. On the ninth of May, 1870, the mortgagor, defendant in the suit to foreclose, filed his petition, and on the eleventh of May he was adjudicated a bankrupt, and on the fourth of June, nearly a month before the decree of foreclosure, the assignee was appointed.

The assignee did not choose to become a party to the suit to foreclose, and the property mortgaged was sold under the decree.

A tenant of the bankrupt was in possession, and he claimed the right to retain possession on the ground that the proceedings in the suit to foreclose, subsequent to the adjudication in bankruptcy, were void. The purchaser brought suit to eject him, and obtained judgment, which was affirmed by the appellate court, and the case was taken by writ of error to the Supreme Court of the United States. Justice Miller, delivering the opinion of the court, at the October term, 1875, said;

"It is a mistake to suppose that the bankrupt law avoids, of its own force, all judicial proceedings in the State or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition.

"The court in the case before us had acquired jurisdiction of the parties and of the subject matter of the suit. It was competent to administer full justice, and was proceeding according to the law which governed such a suit to do so. It could not take judicial notice of the proceedings in bankruptcy in another court, however seriously they might have affected the rights of parties to the suit already pending.

"It was the duty of the court to proceed to a decree as between the parties before it, until, by some proper pleadings in the case, it was

informed of the changed relations of any of the parties to the subject-matter of the suit. Having such jurisdiction and performing its duty as the case stood in that court, we are at a loss to see how its decree can be treated as void. It is almost certain that if, at any stage of the proceedings before sale or final confirmation, the assignee had intervened, he would have been heard to assert any right which he had or set up any defense to the suit. The mere filing in the court of a certificate of his appointment as assignee, with no plea or motion to be made a party or to take part in the case, deserved no attention and received none. In the absence of any appearance by the assignee the validity of the decree can only be impeached on the principle that the adjudication of bankruptcy divested the other court of all jurisdiction whatever in the foreclosure suit. The opinion seems to have been quite prevalent in many quarters at one time that the moment a man is declared a bankrupt the district court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other courts, except in so far as the circuit courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person who contested with the assignee any matter growing out of disputed rights of property or of contracts into the bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view.

"The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of his rights by the bankruptcy of his adversary.

"The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has for certain classes of actions conferred a jurisdiction for the benefit of the assignee on the circuit and district courts of the United States, it is concurrent with and does not divest that of the State courts."

The same learned judge, in *Bracken vs. Johnston*, in the Circuit Court for the district of Iowa, at the October term, 1876, reported in the *Central Law Journal* of the fifth of January, 1877, decided that the proceedings in bankruptcy did not oust the State courts of their jurisdiction. It was the case of an attachment levied within four months of the commencement of the proceedings in bankruptcy. "The court may go on," says Justice Miller, "and render judgment and may execute it, if property subject to execution can be found, but the lien of the attachment is at an end, and the assignee is entitled to the property or the proceeds."

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In *Claffin vs. Houseman*, decided in the Supreme Court of the United States at the October term, 1876—*Chicago Legal News*, twenty-third of December, 1876—Justice Bradley, the organ of the court, repeats the language used by Justice Miller in *Eyster vs. Gaff*, to the effect that the jurisdiction of the State courts is not divested by the proceedings in bankruptcy; and reaffirms that doctrine.

The simple fact that the bankrupt law enables the assignee to prosecute and defend suits pending in the name of the bankrupt, in the same manner and with like effect as the bankrupt might have done, or as if originally commenced by the assignee, is a sufficient manifestation of the legislative understanding, intention, and will, that the jurisdiction of the State courts should not be divested by the bankruptcy.

We do not think the assignee has any right in this case to interfere in the litigation between the appellants and the appellees, since he has appeared only through counsel at the hearing for the single purpose of asking that the proceedings be perpetually stayed.

Where the assignee intervenes at a proper time to defend a suit pending against the bankrupt, he has no right to demand a stay of proceedings; nor can he plead the final discharge in bar. Where no property of the bankrupt is to be affected by the proceedings, the only object of prosecuting the suit to judgment is to ascertain the amount of the debt, which may afterward be proved in bankruptcy. Besides, by the very terms of the law, the application for a stay of proceedings is to be made by the bankrupt himself, (section 21, Revised Statutes, sec. 5106) and the discharge is granted to the bankrupt for his personal benefit, protection, and relief. Sections 32, 34, Revised Statutes, sections 5114, 5119.

We proceed therefore to inquire what effect is to be given to the plea and discharge filed in this court by the bankrupts, so far as they are personally concerned, leaving the assignee entirely out of view.

By the constitution of Louisiana, article 74, this court has appellate jurisdiction only, except that it may grant certain writs, habeas corpus, mandamus, prohibition, etc., in aid and as incidents of its appellate jurisdiction. In the exercise of this jurisdiction it reviews the judgments and proceedings of inferior courts, "in so far as it shall have knowledge of the matters argued and contested below." C. P., article 895. And this knowledge it can have only by reference to the transcript of the record and proceedings in the court below, brought up by the appeal. C. P. article 896.

In general, parties are not allowed to plead in this court other matters than those which were before the inferior court. There are, however, certain peremptory exceptions which may be pleaded in this court, although they have not been pleaded in the court below, such as

prescription and *res adjudicata*; but even these exceptions can be pleaded in this court only where the proof in support of them appears on the face of the proceedings in the lower court by the mere examination of the record. C. P. 902.

In *Zollicoffer vs. Buggs*, 3 Rob. 237, *res adjudicata* was pleaded in this court, and the proof was the decision of this court rendered at the preceding term. The court refused to admit the plea, because the proof did not appear on the face of the proceedings in the lower court and was not in the record of appeal. See also *Carpenter vs. Bently*, 12 Rob. 540.

In the *New Orleans Gas-light Company vs. Hudson*, 5 Rob. 487, the court, refusing to consider new matter, said: "This court is called upon to review the decisions of inferior courts on the facts and pleadings as they were presented to them, and will not listen to pleas not made to them."

Something may have occurred since the judgment appealed from was rendered which would satisfy or discharge it, but this would not make the judgment erroneous or enable this court to reverse or to avoid it, and if this court should undertake to receive a plea not made in the court below, and to hear proof in support of it not appearing on the face of the record, it would simply be usurping and exercising original jurisdiction in violation of the organic law.

In the exercise of its appellate jurisdiction this court is and must be ignorant of anything that may have occurred in relation to the parties or the cause, beyond that which appears in the proceedings of the lower court, except for the purpose of making necessary parties in case of death, etc., and we can no more admit this plea, or give effect to the discharge in bankruptcy than if it were a plea of judgment supported by a receipt and acquittance, or any other new matter not appearing on the face of the record.

When this court "once has acquired jurisdiction of an appeal, whether by transmission of the record, or by that of the citation served on the appellee, it can not in any case permit the appellant to withdraw his appeal without the consent of the appellee, and the cause shall take its course, whether the appellant make default or not." C. P. art. 901.

If we should reverse the judgment of the court below we would afford the appellants the relief which it is their right to demand. If they should make default, or refuse to prosecute their appeal, that would not dispense this court with the performance of its duty, "and the cause shall take its course." If we should affirm the judgment appealed from, our decree would give it no additional force or effect; nor have we the power, unless the court below has the power, to deprive the appellants of any of the benefits of the discharge in bankruptcy.

We have given very much more time and attention to this branch of

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the case than we should have considered necessary but for the decisions in Fox vs. Weed, 21 An. 58, and Viosca vs. Weed, 23 An. 218, in the first of which Weed was appellee and in the second he was appellant. He was permitted to plead his discharge in bankruptcy granted on his petition filed after the appeals had been returned into this court; and upon the exhibition of the certificate the appeals were dismissed. These decisions were undoubtedly in accordance with the opinion generally prevailing at the time they were rendered, that the jurisdiction of the State courts was divested by the proceedings in bankruptcy. In the language of Justice Miller "there is nothing in the bankrupt act which sanctions such a proposition," and the Supreme Court of the United States "has steadily set its face against this view."

There seems to be no legal obstacle to the final disposition of the cause, and we proceed to consider it on the merits.

Hoffman & Co., of New Orleans, shipped to Serra é Hijo, of Barcelona, four hundred bales of cotton, against which they drew for £6630, at sixty days sight, payable at London. The invoice and bill of lading reached Barcelona before the arrival of the cotton, and the bill of exchange was accepted on the sixth of May, 1872. Serra é Hijo, by letter of the thirteenth of May, which Hoffman & Co. received on the thirty-first of May, advised Hoffman & Co. of the acceptance of the bill and of its equivalent in dollars, *valeur au 6 Mai*, \$32,557 71.6. In a note at the foot of this letter the particulars are given showing how this amount is arrived at, and we consider the expression *valeur au 6 Mai* as informing Hoffman & Co. that, in order to meet the bill at maturity in London, Serra é Hijo had expended a sum of money which was equivalent to \$32,557 71.6 cash on the sixth of May.

The cotton was sold at different dates from the twenty-sixth of August to the twenty-ninth of November, and on the eleventh of December a detailed account was made out showing a balance against Hoffman & Co. of \$1945 29.1, which was forwarded by Serra é Hijo, with a letter of same date, and received by Hoffman & Co. on the eighth of January, 1873.

Two days after, on the tenth of January, Hoffman & Co. acknowledged receipt of this account and letter, and say:

"Votre compte de vente à nos 400 balles ex Castilla a été trouvée parfaitement correcte, et la petite solde \$1945 29.1 en votre faveur a été portée à votre credit. A l'occasion d'une nouvelle affaire avec votre honorable maison nous allons deduire le montant de nos tirages."

Serra é Hijo were not satisfied with the mode of settlement proposed, and they drew on Hoffman & Co. for the balance due, to the order of Avendano Brothers.

Hoffman & Co. did not pay this draft, and on the seventh of May they wrote Serra é Hijo asking for indulgence. In that letter they say:

"Comme vous ne devez pas avoir besoin absolument de cet argent, nous ne doutons que vous nous obligerez en attendant un moment plus propice."

In an interview with Avendano, Hoffman & Co. said they had in writing acknowledged this debt, and they would be glad to pay it in another purchase and shipment of four hundred bales of cotton. This last interview was probably about the twentieth of June, and this suit was brought on the thirtieth of June, 1873, to recover the balance, \$1945 29 in gold, with five per cent interest from the twenty-sixth of November, 1872.

In their answer Hoffman & Co. complain that Serra é Hijo charged interest from the sixth of May, the date of acceptance, on the \$32,557 71.6, equivalent of the bill for £6630, whereas they should have charged interest from the maturity of the bill.

As the acceptors, Serra é Hijo, lived at Barcelona, and the bill was payable at London, they were compelled to remit the necessary amount to London. Obviously they must have done this by purchasing exchange on London, and it is manifest that they charged interest from the sixth of May because, whatever it cost them to place the required amount in London, they reduced it to cash on the sixth of May. This is fully explained by Avendano in his testimony, and is sufficiently shown by the letter of thirteenth May; and Hoffman & Co. must have understood the transaction perfectly when, on the thirty-first of May, they received that letter.

In the account of the eleventh of December special reference is made to this letter of the thirteenth of May, and all that relates to the bill on London is set down in the account with such prominence that one could hardly glance over it without seeing precisely what it cost to pay the bill, and that interest was charged on that amount from the sixth of May.

Hoffman & Co. also plead that they had not looked into the account when, on the tenth of January, they acknowledged it to be perfectly correct, and informed Serra é Hijo that the balance shown by that account had been carried to their credit. It was proven that the account was handed by Hoffman & Co. to their clerk, whose duty it was to examine it, and he reported it correct, and the letter of the tenth of January was written by one of the members of the firm after this.

Such a plea comes with bad grace from merchants whose daily business it is to deal with accounts. It was the work of a few minutes to run over this account. It contains full particulars, and occupies one side only of a half-sheet of account paper, and it is plain and easily understood. It is possible, hardly probable, that a merchant would have an account of the character of this in his possession for two days without having the curiosity, and finding the time to examine it, but it would be most

extraordinary if he should carry the balance shown by that account to the credit of his correspondent, and so advise him, without having first ascertained and verified its correctness. It is not possible to account for the repeated acknowledgments by Hoffman & Co. of the correctness of this account upon any other hypothesis than that it does show truly the balance due by them to Serra é Hijo.

Appellants also complain and plead that Serra é Hijo should have sold the cotton at or before the maturity of the bill; and if they had done so, as duty required, the result would have been a balance in favor of Hoffman & Co. of at least two thousand dollars, which amount they claim in re-convention.

It is worthy of remark that the first complaint or objection of Hoffman & Co. to this account is made in their answer to the suit, filed on the third of November, 1873. There is no proof of negligence on the part of Serra é Hijo; and it must be presumed, in the absence of proof to the contrary, that having advanced so heavily on this cotton Serra é Hijo desired to obtain the highest price possible, and that they used their best judgment and discretion for that purpose.

We do not think it necessary to go more minutely into the evidence, the substance of which we have already stated. It suffices to say that the letters of Hoffman & Co. of the tenth of January and seventh of May, their acknowledgment to Avendano of the indebtedness in May and June, their evident desire to continue commercial relations with Serra é Hijo, and their direct proposition to purchase and ship another lot of four hundred bales cotton, are absolutely irreconcilable with the idea that they had any just cause of complaint, or reasonable objection to the account.

The verdict of the jury and the judgment of the court below are strictly in accordance with the law and the evidence, but this is not a case for damages as prayed for by appellees.

The judgment appealed from is therefore affirmed with costs.

No. 3656.

J. W. GARRISH vs. W. B. HYMAN.

When the mortgage act has the necessary revenue stamps, the notes identified with the act need not be stamped.

A mere reference in any public act to a certain plan, or record, for the sake of certainty, does not make it a part of the act, and hence a certified copy of the act is complete without such plan, or record.

The possession of a negotiable note, indorsed in blank, and secured by a mortgage given in favor of any future holder of the note, will authorize the holder of the note to take out executory process.

It is not necessary for a judge to give a statement of reasons, in an order of seizure and sale.

A PPEAL from the Second Judicial District Court, parish of Jefferson. *Pardee, J. N. Commandeur*, for plaintiff and appellee. *W. B. Hyman*, for defendant.

The opinion of the court was delivered by EGAN, J.

This appeal is from an order of seizure and sale.

The first ground of error assigned is that the order was granted on non-authentic and insufficient evidence, and that no mortgage or privilege is shown in favor of any one.

The record contains an authentic act of sale with mortgage reservation, and two promissory notes regularly paraphed and identified with the act which secures their payment. The evidence was both authentic and sufficient.

The second error assigned is the want of revenue stamps upon either act of sale and mortgage, or notes, and which are therefore alleged to be null and should not have been received in evidence.

It is unnecessary for this court to consider whether any such effect would follow, even if the facts were as stated, as the copy of the act of mortgage in the record claims that the revenue stamps were affixed to the original act. This is all the law required; where the mortgage was stamped the notes were not required to be stamped.

The third ground of error assigned is that the copy of the act shows on its face that it is not a true and full copy, and that it was not certified by one authorized in law to do so.

The copy was certified by Andrew Hero, notary public and custodian of notarial records for the city of New Orleans and parish of Orleans. He was the proper officer to give and certify the copy and certificate, and he does certify that the copy presented to the judge *a quo* and upon which he acted is "a true and correct copy of the original act." The objection that it was not a true and full copy as shown by its face we presume was based upon the absence of a sketch of property conveyed in the act, which is therein said to be "annexed in the margin for reference," and "marked" by the notary "to identify it." This sketch was

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not made a part of the act by being thus referred to and marked, any more than was another lithographic plan said in the act to be deposited in the office of De Armas, notary public, which is also referred to. Such reference in acts, public and private, is very frequent, and while contributing to certainty of description, by no means makes the act, or plan or record, referred to, a part of the act. We think then the third ground of error was not well taken.

The fourth assignment is the absence of *authentic evidence* of any right in plaintiff as claimed; excess in the amount to satisfy which the sale was ordered; and the granting of "executory process," when not prayed for.

The right of the plaintiff is shown by the fact that he appears as the owner and holder of two promissory notes found in the record, payable to the order of appellant and by him, indorsed, and so recited in the act of mortgage, which is in favor of the vendor and immediate mortgagee or "any future holder" of the notes. That this is sufficient authentic evidence to authorize "any holder" to sue out executory process is too well settled to be now controverted. As to the other two grounds in this, the fourth assignment, we find nothing in the record to sustain them. The order is granted for the amount of the notes with eight per cent interest from the date stipulated in them, with only the addition of three dollars and ninety-five cents, cost of protest, and four dollars, cost of copy of act of sale and mortgage, which were properly allowed, but if not, would come under the rule "*de minimis*," and as to the other ground, the petition expressly prays for "executory process."

The fifth and only remaining ground of error assigned is that the judge adduced no reason for granting executory process, and therefore failed to comply with the constitution of the State in his order, which is a judgment.

The record discloses that the petition, notes, and authentic copy of the act of sale and mortgage, importing confession of judgment, were presented to the district judge, whose order appears to have been written upon the petition, at the foot of which it is found in the record in these words, "let executory process issue herein as prayed for and according to law," and is sealed and signed by the judge. While it might be the better practice to refer to the petition and accompanying evidence in the order, the form used by the district judge is, we believe, the usual one; and is to be interpreted by the law requiring the production of authentic evidence before granting an order of seizure and sale. We are, however, not disposed to regard a statement of reasons in the order itself as sacramental in regard to this class of orders, which for some purposes and to a certain extent have the effect of judgments.

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As the appellant may have supposed that there was error to his prejudice, although we see none, we are not disposed to allow damages for a frivolous appeal, as prayed for by the appellee.

It is therefore ordered, adjudged, and decreed that the order of seizure and sale in this case be sustained and affirmed, and that appellant pay costs.

No. 5339.

GEORGE L. GETTWERTH AND WIFE VS. TEUTONIA INSURANCE COMPANY.

In the organization of juries, it is not necessary that the sheriff should furnish a list of all persons liable to jury duty, and put them in the jury box *every* December. The box must be exhausted before being refilled.

Where a policy of insurance stipulates for payment of losses sixty days after adjustment, and the assurers make reasonable efforts to effect an adjustment, they will not be liable for interest from the expiration of the sixty days, but only from judicial demand.

A PPEAL from the Fifth District Court, parish of Orleans. *Cullom, J.* Jury trial. *Braughn, Buck & Dinkelspeil*, for plaintiffs and appellee. *Hudson & Fearn*, and *B. R. Forman*, for defendants.

The opinion of the court was delivered by SPENCER, J.

The plaintiffs bring this suit to recover of the defendant the amount of a fire policy of insurance for two thousand dollars, to wit: "on stock consisting of wines, liquors, confectionery, on soda-water stand and store fixtures, fifteen hundred dollars; on furniture belonging to saloon five hundred dollars, contained in the two-story frame slated house on south-east corner of Canal and Liberty streets."

It seems that on the morning of first of August, 1872, about five o'clock, an adjoining building took fire, which communicated to the establishment of plaintiffs above described. The establishment consisted of two rooms fronting on Canal street, and one in rear, on the ground floor, and four rooms and a cabinet on the upper floor. The two rear rooms on the second floor and the cabinet were used in connection with the establishment below as private dining rooms, etc. On the lower floor the corner room was used as a confectionery, and the other Canal-street room as a bar-room, and the third room in rear of the two as a saloon, with tables, sideboard, mirrors, curtains, etc.

The answer of the defendant admits the execution of the policy, and generally denies plaintiffs' allegation. It specially alleges that plaintiffs' estimate of loss is grossly exaggerated, and that they have sworn falsely to said loss, with the view and design of defrauding defendant, and have thereby forfeited all claim under said policy.

The case was tried by jury. The defendant challenged the array of jurors for the reason that the law required of the sheriff of the parish

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of Orleans, "in the month of December, to furnish a list of all persons liable to jury duty residing within the limits of the parish of Orleans." Revised Statutes, sec. 2144.

"Whenever a jury is to be drawn, it shall be the duty of the sheriff to draw from the jury box the names of the persons, and continue so to draw for each successive jury, until all the names in said box have been drawn out, and no person shall be required to serve a second time upon the jury until all the names have been drawn from the box, and whenever the box shall be emptied the sheriff shall return all the names upon the jury list into the jury box to commence a new drawing." *Ibid*, sec. 2146.

Paragraph 2125 declares the qualifications of a juror "to be a duly qualified voter." Defendant contends that under these provisions it was the duty of the sheriff, every December, to furnish a list of all persons liable to jury duty, and put them in the box anew, regardless of whether the box had been exhausted or not. That as the box had not been filled since 1870, and many persons had become of age, or been naturalized, and therefore liable to jury duty since then, the array was illegal. We think that both the text of the law and its reason repel this view of the case. It would be impracticable to carry it out. It would necessitate an annual census or registration of the voters of the parish of Orleans. The court properly overruled the challenge. As stated, the case was tried before a jury, who found \$1500 for plaintiff, with legal interest from first October, 1872. The record is very voluminous. The testimony occupies about four hundred and fifty pages of the transcript. We have examined it with as much care as we could give it. It all relates to the questions as to the extent of the fire in the building, the quantity and quality of stock, fixtures, and furniture, and their value, in the house at the time of the fire, and the extent of the damage and loss caused by it. It is impracticable to enter into details of the evidence in this opinion. There is between the testimony of plaintiffs' witnesses and those of defendant irreconcilable contradictions. But there are some salient and principal points which seem to us to be established.

First—The insurance company before accepting the risk for two thousand dollars sent its inspector to look at the premises and notice the stock to be insured. The testimony shows that this inspector expressed himself entirely willing to take a risk of two thousand dollars on the property, and some of the witnesses say he suggested making the policy for a larger amount, say three thousand dollars. However this may be, he must have reported to his company favorably on the risk for two thousand dollars.

Second—The evidence satisfies us that the plaintiffs' stock, fixtures,

and furniture did not diminish between the date of the policy and that of the fire. The evidence of numerous witnesses, who had apparently good opportunities of knowing, shows that plaintiffs conducted a prosperous business in their line, with daily receipts ranging from forty to one hundred dollars per day, which must of necessity have required a considerable stock.

Third—There is no pretense that any part of the property insured had been fraudulently removed, or that plaintiffs were guilty of any complicity in starting the fire.

Fourth—We are also satisfied that the fire did not reach either the confectionery room or the bar-room, and that whatever damage was done to their contents was from water and breakage. In the saloon and in the upstairs dining rooms there seems to have been considerable damage done.

Fifth—Plaintiffs offer in evidence and swear to a list and the value of their stock, fixtures, and furniture, and fix the value thereof at \$2775 77. We incline to the opinion that the values are fixed too high. We think under the evidence it is safer to fix it at \$2000, the amount which the defendant insured it for. True, many of defendant's witnesses fix it much lower, but it does not come with good grace from the company to expect this court, amid the conflicting evidence in this case, to put it at less, especially as it was paid its premiums at that value. Besides, we think the weight of evidence will justify that amount.

Sixth—We are also satisfied that the value of the property saved was fully one-half of that insured, and should be deducted from the amount of the policy. This would leave the amount due the plaintiffs by the company one thousand dollars.

It is proper to state that the plaintiffs carried on their business exclusively on the cash plan, and kept no kind of books. Under these circumstances it would be unreasonable to require or expect that exactness of proof which more extensive establishments can usually give. We think they have rendered it reasonably certain that their property insured was worth two thousand dollars, and that their loss was as much as one thousand.

The policy provides that the loss shall be paid within sixty days after adjustment. The jury gave interest from first of October, sixty days after the loss. We think this is erroneous, both under the terms of the policy, and in equity. The company seems to have used reasonable efforts to arrive at an adjustment, but the plaintiffs demanded the whole amount of their policy, which the company did not owe. We think interest in this case can be allowed only from judicial demand.

In conclusion, we do not think the plaintiffs have overestimated their goods with intent to defraud the defendant. In cases of this kind it

would require most cogent and manifest evidence of such an intent, to induce the court to apply such a rule.

We think the charge of the judge *a quo* to the jury was substantially correct, and that defendant suffered no prejudice therefrom.

It is therefore ordered, adjudged, and decreed by the court that the judgment appealed from be avoided and reversed; and it is now ordered, adjudged, and decreed that the plaintiffs, Mrs. Dina Hulsmann and her husband, George L. Gettwerth, do have and recover of the Teutonia Insurance Company of New Orleans the sum of one thousand dollars, with legal interest from judicial demand, and that plaintiffs pay costs of appeal, and defendant those of the lower court.

No. 6499.

SUCCESSION OF MARGARET MCAULEY, WIFE OF JOHN A. O'BRIEN.

A transposition of the words of a will in order to make the devise conform to some supposed intent of the testator will not be allowed when the words, just as they stand, have a manifest meaning and express a clear and intelligible idea. Such transposition is only permissible when the language of a will is senseless or contradictory.

An administrator can not avail of any defect in a legal proceeding caused by his fault.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J. James Timony, T. W. Collens, A. Robert, and W. B. Lancaster*, for appellants. *Hornor & Benedict, J. L. Tissot, and Hays & New*, for appellees.

The opinion of the court was delivered by MANNING, C. J.

On the twenty-third of November, 1874, Margaret McAuley, wife of John A. O'Brien, made her olographic will in form as follows:

NEW ORLEANS, November 23, 1874.

"I, Margaret O'Brien, of the city of New Orleans, and State of Louisiana, being of sound mind leave this my last will and testament.

"I name my husband executor of my last will. All my debts must be paid out of estate. Rent for store my husband must not be held responsible as he has signed notes for same for me. All bills for goods bought by me a note of Washington Smith of New York, for the sum of four hundred dollars said is mine but is signed by my husband John A. O'Brien. All my funeral expenses, I desire to be buried as plain as possible a plain stone to mark my last resting place. The sum of three thousand dollars to be paid to my husband with 8 per cent interest, from 16 August 1872. All my furniture is his. All my jewelry that is a diamond set breast-pin earrings and bracelets a diamond ring, my wedding ring I de-

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sire to be buried with. My diamond watch and chain I leave to my sister Frances Dowling.

"After all my funeral expenses are paid Dr. bill and all sundries expenses are paid if there is any money left I wish it settled on my sister Frances Dowling children for their use and benefit. If I should leave a child all this will to be null as all I have belongs by right to my child, either male or female. I want my child put under the care of Sister Chantrel as I know she will take good care of it my husband to pay her out of the revenues of my estate.

"MARGARET O'BRIEN."

The writing covers the first and part of the second page of the paper. The signature made at that time is at the bottom of the second page, leaving a space of several lines between it and the concluding words of the will. In January, 1875, the testatrix was delivered of a child, which survived its birth but a short time. On the nineteenth of August, 1875, after the death of her child, the testatrix affixed her signature to the writing of the previous November immediately under the last line and added the following words between that signature and the first signature, at or near the bottom of the page:

"NEW ORLEANS, August 19, 1875.

"If I and my husband should die during my trip from home, after all my debts are paid whatever I die possessed I leave to St. Mary's Orphan Boys' Asylum less six hundred dollars
MARGARET O'BRIEN.
for my mother. MARGARET O'BRIEN.

"ADELINE SHELSTONE."

On the day following that on which this was written Mrs. O'Brien left New Orleans with her husband on a journey of business or pleasure for New York, and she died there on the twelfth of September. Her husband returned immediately, and on the eighteenth of that month presented the will or wills of his deceased wife for probate and qualified as executor.

On the fourth of October of the same year, the mother and sisters of the deceased, who are her heirs-at-law, instituted an action to annul the probate and set aside the wills upon the grounds that the first writing, which they call the first will, was revoked by the birth of a child posterior to its date, and the second falls because the event upon the happening of which the institution of the universal legatee was made to depend has not happened and can not now happen; i. e., the death of both husband and wife during their trip north.

The executor answers by a general denial. The St. Mary's Orphan Boys' Asylum pleads the general issue and specially avers that the two instruments constitute but one will, and that both comply with the requisites of an olographic will, and that the dispositions made are "in

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conformity to law and can be easily executed, being intelligible and comprehensible in its extent and designs," and last, that the document was signed and dated by the deceased subsequent to the birth and death of her child.

Much stress has been laid in the arguments, both oral and written, on the fact that the two writings are of different dates, were written with two shades of ink, the signature first spoken of being of the same shade as the body of the writing of November, 1874, and the others of the same shade as the body of what is termed by some the second will and by others the codicil. The different shades of ink are worthy of observation only because they assist us in ascertaining the circumstances under which the two writings were made. We find no difficulty in the different dates. Villeneuve says:

"Un testament fait en un seul context mais signé et daté plusieurs fois de dates différentes ne constitue pas autant de testaments qu'il y a de parties séparément datées et signées. En conséquence, l'acte portant révocation et tous testaments antérieurs, sauf un seul indiqué comme ayant la dernière date du testament divisée en plusieurs parties ne porté aucune atteinte aux parties de ce testament qui ont une date différente." Digest 1850, tome 4, 139, No. 210. And further on: "jugé, de meme, que bien que la date primitive d'un testament olographe en rapporte la confection antérieure à la date de l'acte révocatoire, le testateur a pu cependant donner à son testament par une surcharge approuvée une nouvelle date postérieure à celle de l'acte révocatoire, et soustraire ainsi son testament aux effets de la révocation." *Idem*, p. 4, No. 240. See Journal du Palais, 1847, 1, 49, 51.

More pertinent than these teachings of Villeneuve is the observation of Dallas: "Un testament olographe portant deux dates différentes, l'une au commencement et l'autre à la fin, ne peut être annulé sous prétexte qu'il y a incertitude de la date. On doit supposer que le testateur a pris plusieurs jours à faire son testament." Vol. v. 632.

We consider the writings before us as one will. The testatrix knew at the time of the first signature that she bore in her bosom a child whose birth would annul her testament. The child was born less than two months from the date of the instrument, and she writes "if I should leave a child, all this will to be null." After the death of the child, and when about to make her will in view of a projected trip north, she mentally reverts to her former disposition of her property, draws the paper containing it from its place of deposit, and signs it anew immediately after its concluding words. Manifestly this was intended by her as a republication of that writing as a part of her will. The death of the child had destroyed the vitality of the will as then written. The republication revived it. The testatrix then added another clause

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providing a disposition of her property upon a contingency expressed therein, and signed the whole instrument, and dated it, and this last date is the date of the will.

We have now to consider the effect of this last clause.

The counsel for the defendants, in a brief which has been very serviceable to us, have argued with equal ingenuity and subtlety that the language used by the testatrix does not express her meaning. Undoubtedly a fundamental rule in the interpretation of wills is that the intention of the testator must be ascertained, and when ascertained, effect given to it; and in order to ascertain the intention courts look outside and behind the *ipsissima verba* of the instrument, and resort to the evidence of circumstances when the literal meaning leads to absurd or impossible consequences. This is when the words are ambiguous or contradictory, or the meaning latent. Pothier in his fourth rule for the interpretation of testaments teaches that the law prefers the sense which saves from intestacy, and that reference may be had to surrounding circumstances to ascertain the sense; and in his eighteenth rule, that "a will should be interpreted by means of surrounding circumstances." *Traité des Testaments*, chap. vii. Those rules are embodied in our Civil Code in articles 1705, 1706, 1708, new numbers 1712, 1713, 1715.

The circumstances surrounding the confection of these two writings are developed in the evidence, and have already been adverted to. In November, 1874, she made her will, giving specific instructions concerning certain debts, and explaining other matters which might not have been understood without that explanation, and appointing her husband executor. She either intended to add something later, or she thought, as many illiterate persons do, that she must sign at the bottom of the page, and accordingly her signature in the same shade of ink is found there. That will was intended to provide a disposition of her property in case her death should precede the birth of her child. In August, 1875, when she knew that the will already written was null, since the event which caused its invalidation had occurred meanwhile, and being about to commence a journey—troubled, too, by a presentiment that she would never return—and perceiving that the paper contained what she wished, so far as it went, but apprehensive that the addition of another clause with a new date might not sufficiently evince her desire to continue the dispositions contained in it in force, she signs it again, and writes the clause relative to the asylum.

We are not embarrassed, as are the counsel for the asylum, by the seeming inconsistency of naming her husband executor in the first part of her will and providing for the contingency of his death in the concluding part. The thought present to her mind evidently was to provide for the two contingencies of her own death, her husband surviving, and the

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death of both of them. In the writing of November, 1874, she also contemplates the survival of her child, and directs that it be placed under the care of a particular person, and in that of August, 1875, when her child was dead, she provides what shall be done if her husband and herself shall both die during their trip.

The counsel for the asylum, pursuant to their theory that the intention of the testatrix has not been accurately expressed, propose a new reading of the last clause of the will, effected by a transposition of words, thus:

THE TEXT.

If *I and my husband* should die during *my* trip from home after all my debts are paid whatever I die possessed I leave to St. Mary's Orphan Boys' Asylum less six hundred dollars for my mother.

THE INTENTION.

If I should die during *my and my husband's* trip from home after all my debts are paid whatever I die possessed I leave to St. Mary's Orphan Boys' Asylum, less six hundred dollars for my mother.

A transposition of words is sometimes permitted. Jasman says: "It is quite clear that where a clause or expression, otherwise useless and contradictory, can be rendered consistent with the context by being transposed, the courts are warranted in making that transposition." *Treatise on Wills*, 1 vol., 437. The nineteenth of his general rules of construction reads: "That words and limitations may be transposed, supplied, or rejected, where warranted by the immediate context or the general scheme of the will, but not merely on a conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the language of the instrument." *Idem*, 2 vol., 744. And Lord Ellenborough, "in a case where," as he said, "the testator had thrown together a heap of words, the sense and meaning of which he did not clearly apprehend," ruled that when "the words taken in the order in which they stood did not convey *any* meaning, the established rules of construction clearly authorized the transposition." *Wolfe vs. Allcock*, 1 B. and Ald. 137.

The transposition is then permissible when the words used by a testator do not convey any meaning, or where the expression is senseless or contradictory, or when such transposition is warranted by the context and like cases; but a conjectural hypothesis is not permitted in opposition to the plain and obvious sense of the language. This court enunciated the same doctrine in *Theall's case*, where it was said: "In the construction and interpretation of wills the intention of the testator must be sought in the words he has used in the will, and not *aliunde*. Constructions and interpretations of wills are not to be resorted to for the discovery of the testator's intention when he has used none but plain, unequivocal expressions." 7 La. 226.

The words used by the testatrix in the will now before us are intelligible in the order in which they stand: "If I and my husband should die during my trip from home." The objection to the new collocation proposed by the counsel for the asylum is that it is not our province to make a will for the deceased, but to interpret and give effect to the one she made. If she chose to make her institution of the asylum as her universal legatee contingent upon the death of her husband and herself, it is not for us to say that she meant otherwise, or that it would have been more reasonable and proper to have made that contingency her own death only.

Lord Coke said that "wills and the construction of them do more perplex a man than any other learning." This perplexity may often be diminished by avoiding a strained construction of words which have an obvious import. Guided by that rule in this case, we are of opinion that the legacy to the asylum or its institution as universal legatee lapses by the non-happening of the event on which it was made to depend.

One other question remains. A sale of perishable property, the goods in the millinery store of deceased, and of the unexpired lease of the store, was made under order of the court. The asylum seeks to annul that sale, but as we have decided that it is without interest in the succession, its prayer to annul can not be heard. The executor and husband was the purchaser of most of the stock and of the lease, which latter brought at public auction a bonus of \$3525. The succession, of which he is the executor, is benefited by the sale. As purchaser, he has not made a good bargain, and wishes to be delivered from fulfilling it. If there are defects in the judicial proceedings which terminated in the sales, it was the fault of the executor or his agents. He can not take advantage of his own wrong.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be and it is hereby affirmed with costs.

NO. 5336.

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where, in a claim for damages, based on a wrongful deprivation, or obstruction of some mental or moral gratification, or personal convenience, the plaintiff makes out that his interest involved in the controversy amounts to more than five hundred dollars, it will suffice to give this court jurisdiction.

Whoever acquires the ownership of a lot of ground, whether by prescription or by any other form of acquisition, thereby acquires the right of way, and every other servitude incident to the property.

The property of an extinct religious corporation vests in the former individual members thereof, who may validly sell the same, in accordance with the customs

29	38
48	1219
48	1321
29	38
113	41
29	38
115	340

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they may have tacitly, or expressly adopted; provided such customs do not conflict with the laws of the State.

Where a lot in a cemetery is sold, with reference to a certain *plan*, on which plan appears a certain avenue, leading up to, or close beside the lot, affording a convenient highway to and from it, that avenue becomes a servitude in favor of the lot, and can not be legally obstructed.

A servitude may be shown by parol evidence.

When a church congregation, who own the soil of a cemetery, have for a great many years entrusted the administration of the cemetery, and the sale of its lots to the priests of their church, they clothe the priests with power to create servitudes on the soil of the cemetery, which will be binding on the congregation, and on all third persons.

The purchaser of a cemetery lot, whether he acquire an absolute or qualified property therein, is entitled to the equitable remedy of injunction, to protect him in the full enjoyment of the lot.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. James Timony and E. Bermudez*, for plaintiff and appellant. *Semmes & Mott and T. Gilmore*, for defendants.

The opinion of the court on the original hearing was delivered by **MORGAN, J.**, and on the rehearing by **EGAN, J.**

In December, 1857, the plaintiff purchased a lot of ground in the St. Patrick's cemetery. The lot is the No. 18, in block No. 8.

He avers that he has caused to be erected on this lot a costly tomb. That he has enjoyed the servitudes belonging to the lot since his purchase thereof. He avers that James Wall and others are attempting to destroy the conveniences of his tomb by interring the dead and erecting tombs and monuments on one of the avenues leading thereto, thus destroying his use of the avenue, which is dedicated to public use.

He says that the acts of the defendants have caused him damages in the sum of one thousand dollars, for which he prays judgment. He also prays for an injunction prohibiting them from erecting tombs or monuments on the avenue named in his petition.

The defendants deny generally the allegations in the petition, and they specially deny that the plaintiff has any right or title to the property described, or the privileges, appurtenances, or right of way as described and set forth in his petition.

We do not think the defendants can question the plaintiff's title, or that it is questionable. He holds under a regular conveyance from a person who, we think, was authorized to sell, and his possession has been undisputed and undisturbed from the date of purchase (1857) until the acts now complained of.

Plaintiff purchased his property according to a plan which was shown him at the time. According to that plan the cemetery was divided into blocks, intersected by avenues. The lot he purchased is situated at the corner of St. Anthony and St. Dominick avenues. There are two entrances to the cemetery—one on Bayou road, the other on Canal street. His lot is very much nearer the Canal-street entrance than it is the Bayou-road entrance.

Entering the cemetery from Canal street, the route to his lot was down St. John's avenue one block to St. Anthony's avenue, and up St. Anthony's avenue the depth of a block, some twenty-five or thirty feet, to St. Dominick's avenue. Now, the obstructions complained of by the plaintiff are being erected on St. Anthony's avenue, between St. John's and St. Dominick's. If allowed to be completed, they will stop up the way to his lot by St. Anthony's avenue, and force him to go down one side of another block and up on the other, thus more than doubling the distance which he now has to make.

It is evident to our minds that the avenues in the cemetery were, when the plan thereof was made and the plaintiff's lot was purchased, dedicated to the use of those who purchased lots therein, and that no obstructions can be put upon them which would render that use either impossible or imperfect. If the owners of the cemetery can block up one avenue, they can block up another, and so on from avenue to avenue until all the tombs therein will be inaccessible. The rights of the owners of lots purchased when the right of way existed can not be thus destroyed.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be avoided, annulled, and reversed, that the injunction herein issued be reinstated and made perpetual, and that the defendants pay the costs in both courts.

WYLY, J. I dissent, and will file my reasons hereafter.

ON REHEARING.

This case is before us on a rehearing after a judgment against the plaintiff and appellant in the court below and in his favor in this court. Plaintiff claims the ownership and possession for many years of lot No. 18 in block No. 8 in St. Patrick's cemetery of the city of New Orleans, the lot being situated at the corner of St. Anthony's and Dominick's avenues. He alleges that soon after his purchase on the twenty-second of December, 1857, he erected thereon an elegant and costly tomb at the expense of about thirty-five hundred dollars; that he paid for the lot ninety-nine dollars; that he selected this a corner lot for its convenience and conspicuousness, and that he has enjoyed undisputed possession of said lot and all the servitudes thereunto belonging since 1857. He alleges that within a few days prior to the institution of suit the defendants have endeavored to destroy the convenience and conspicuousness of his tomb by erecting tombs and monuments in St. Anthony's avenue, thus obstructing petitioner's access to his tomb and destroying its conspicuousness, and also impeding the right which petitioner has in common with so many others to the use of these avenues, which have been de-

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voted to public use ever since the formation of the cemetery. He alleges damage to the amount of one thousand dollars by the illegal acts of the defendants, and fears that others, encouraged by their example, will bury dead and erect tombs in the said avenue and others until access to his tomb becomes impossible for the purpose either of depositing the dead or paying the usual rites of cherished affection, and prays that defendants be perpetually enjoined from proceeding further in erecting tombs or monuments in St. Anthony's avenue, in St. Patrick's cemetery, and that they each be ordered to restore said avenue to its former condition.

To this petition the defendants answer by denying generally all its allegations, and specially deny that plaintiff has right or title to the *property*, the *privileges*, the *appurtenances*, or the right of way, described and set forth in his petition.

Before proceeding to the discussion of the merits, we must first consider a motion by the defendants and appellees to dismiss this appeal for want of jurisdiction, because the amount in dispute does not exceed five hundred dollars. The plaintiff has alleged that he will be greatly inconvenienced in and may be deprived altogether of the use of property costing him near thirty-six hundred dollars, purchased and used for a family burial place and devoted to the memory and deposit of the bodies of the dead. He alleges damages of one thousand dollars, and files an affidavit declaring that his interest in the matter in controversy amounts to over five hundred dollars.

This case may well be considered similar to those embraced in the third paragraph of article 1934 of the Revised Civil Code, which provides "that damages may be assessed without calculating altogether on the pecuniary loss or the privation of pecuniary gain to the party, where the contract has for its object the gratification of some intellectual enjoyment, whether in religion, morality, or taste, or some *convenience or other legal gratification*, although these are not appreciated in money by the parties, yet damages are due for their breach; a contract for a religious or charitable foundation, a promise of marriage, or an engagement for a work of some of the fine arts are objects and examples of this rule." Will it be argued that the depositaries of the dead and the sentiments of natural affection of the living relatives and friends are less sacred or less valuable than the examples enumerated? Again, this court has often taken jurisdiction of cases involving no money demand, as in cases of divorce or where some great public interests are at stake, not appreciable in money. In the case of *Knight vs. Knight*, 12 An. 59, for divorce unaccompanied by any money demand, the court maintained the appeal upon an affidavit of interest to an appreciable amount.

The petition to dismiss is overruled.

ON THE MERITS.

The plaintiff claims both ownership and peaceful and uninterrupted possession since 1857, as owner of lot eighteen, block eight, in St. Patrick's cemetery, and of the right of passage along St. Anthony's avenue to and from his lot; that he is a resident of New Orleans and both as one of the public, and as lot owner and possessor, that he is entitled to have removed the obstructions placed by defendants in the avenue, which has been devoted to public use since the foundation of the cemetery. If the evidence sustains any one of these allegations of right, he is entitled to relief, and it is not very material, in the opinion of the court, to what class of actions the present is to be assigned, or whether to any particular class, a matter upon which much stress has been laid in argument. An elementary principle of our law is that wherever there is a right there is a remedy. If the right of plaintiff, in the enjoyment of which he alleges disturbance, be an incorporeal real right, then he can maintain the action technically styled possessory. C. P., articles 46 and 47. The possession of incorporeal rights, such as servitudes and *other rights of that nature*, is only a quasi possession, and is exercised by the species of possession of which these rights are susceptible. Rev. C. C., art. 3432. Among the rights which are common to all possessors, whether in good or bad faith, are —

First—That they are considered provisionally as owners of the thing which they possess so long as it is not reclaimed by the true owner or person entitled to reclaim it, and even after that reclamation till the right of the person making it is established,

Second—That every person who has possessed an estate for a year or enjoys peaceably and without interruption a real right and is disturbed in it *has an action against the disturber* either to be maintained in his possession or to be restored to it in case of eviction, whether by force or otherwise.

Third—That such possessor may by prescription acquire the property of the thing which he thus possesses after a certain time, which is established by law according as he has possessed in good or bad faith. Rev. C. C., art. 3454. Article 3455, Rev. C. C., provides that "the action which a possessor for one year has against a person disturbing his possession to be maintained in or restored to it as is said in the preceding articles shall be decided before pronouncing on the question of ownership, and the real owner shall not be allowed to repel it by endeavoring to prove his right." This is the possessory action proper. He who acquires an immovable in good faith and by a just title prescribes for it in ten years. Rev. C. C., art. 3478. "The possessor in good faith is he who has just reason to believe himself the master of the thing which he possesses, although he may not be in fact, as happens to him who buys a thing

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which he supposes belongs to the person selling to him, but which in fact belongs to another." Rev. C. C., 3451. By the term "just title" in cases of prescription we do not understand that which the possessor may have derived from the true owner, for then no true prescription would be necessary, but a title which the possessor may have received from any person whom he honestly believes to be the real owner, provided the title were such as to transfer the ownership of the property provided it had been derived from the real owner. Rev. C. C., articles 3484 and 3485. Good faith and possession as owner are always presumed in matters of prescription unless it appears that the possession began in the name of and for another. Rev. C. C., articles 3481 and 3488.

Without for the present discussing the precise nature of the property or rights acquired by the plaintiff by the act of sale from Father de la Croix, of the twenty-second of December, 1857, to the lot claimed by him, the evidence fully establishes his peaceable and uninterrupted possession and enjoyment under claim of ownership of lot eighteen in block eight of St. Patrick's cemetery, and of all its accessory rights, including the use or right of way along St. Anthony's avenue, from the date of the title for more than ten years and up to within a month or two before the institution of this suit, when the defendants placed in St. Anthony's avenue the obstructions complained of. It is also clear that the plaintiff was in perfect good faith, and believed himself to have acquired title from the true owner of the soil, whether he did so or not: therefore if his title be such as to convey ownership of the property, he comes within the rules laid down in the Code for acquiring title to real estate by the prescription of ten years, and had so acquired it before the alleged disturbance. It is also true that he bought by the plan of the cemetery filed in evidence, and with reference to it, which thus became part of the title, and that at the time of the purchase, and since, until the disturbance complained of in this suit, he and all other lot owners or persons enjoying the right of burial in St. Patrick's cemetery, and the public, enjoyed the unobstructed right of passage through St. Anthony's avenue, as well as all other benefits which he may have derived from the situation of his as a corner lot.

And while it is true that, viewed merely as an accessory right or servitude for the benefit of particular property, the non-apparent discontinuous right of passage can not be acquired by prescription for any length of time without a title, it is a mistake to suppose that a person who acquires title by prescription to a piece of property, although not from the true owner, does not at the same time acquire the rights of passage and all other rights incident or accessory to the property so acquired by prescription. It is urged, however, with much zeal by the counsel for the defendants, that the property in the soil of the cemetery

is still in the defunct corporation, the Roman Catholic church of St. Patrick, incorporated in 1833, by special act, with a duration of only twenty years, and which therefore expired in 1853, and that since that date no title could be conveyed by the extinct corporation, because it was extinct, nor by any one else, because the property is still in the corporation.

We can not assent to this proposition, which can hardly have been seriously urged by the eminent counsel for the defense in this case. It is well settled that the property of corporations becomes vested in its members upon the dissolution of the corporation. See 7 An. 287. In this case, in the members of St. Patrick's church, a religious body, which has continued to exist up to this time in a non-corporate capacity, so far as appears from the evidence, and which, through its priests and officers, has continued to control St. Patrick's cemetery, and to sell rights of burial in sepulture or lots in the cemetery, according to the testimony in the record, until so many burial lots have been sold, and so few remain to be sold that it is now attempted to convert avenues into lots, doubtless with a view to church revenue, and, it would seem, without reference to the convenience or wishes of those who acquired property or rights in the cemetery with reference to the plan, and to the use of these avenues, then open, including St. Anthony, the closing and obstructing of which is complained of in this case. Religious corporations or associations are, however, like all others, bound by their contracts, and by the principles of good faith and obligation which rest upon individuals under like circumstances. "*Sic utere tuo ut alienam non ludo*" is a maxim as old as the law itself, and we are indebted to one of the authorities quoted in the brief of defendants' counsel, Kincaid's Appeal, 66 Penn. 411, for its renewed expression in this language: "Every right, from absolute ownership to an easement, is held subject to the restriction that it shall be so exercised as not to injure others." While, then, we have no disposition to restrict the priests or congregation of St. Patrick's church, were they parties to the record, as they are not, in the exercise of all legitimate control over St. Patrick's cemetery, both they and those claiming as holding under them must be reminded to conform to these principles.

In 12 Harris's Penn. Rep., p. 249, another law quoted by defendants' counsel, it was held that "religious corporations are voluntary associations, governed by rules of their own, and not by the laws of the State. The supreme authority of the State must, however, sometimes exercise control, but then it generally takes the laws and customs of the church as its guide, just as between individuals it takes their contracts and usages, and only for want of them resorts to the general laws of the land." We accept this as a correct exposition of the law, with the lim-

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itation that the rules and customs of the church must not contravene the laws of the State. In the case of Beatty vs. King, 2 Peters 566, it was held that "there was no proof of authority in plaintiffs except parol, and that they assumed to act without question of their authority, and formed part of the Lutheran Society, a religious body, and yet in a most important litigation, involving valuable property and large interests, the church congregation was held to be properly represented by them. It appears from the evidence that the plaintiff acquired his title and whatever rights it conveys according to the customs and usages of St. Patrick's church, and from the priest, who, as shown by Father Allen's and other testimony, makes all the titles. He says that he has himself sold fifty or sixty lots in the cemetery; that nearly all the lots have been sold, so that space is well-nigh exhausted; and although defendants set up in their answer no title in themselves, Father Allen, the priest in charge, tells us that he sold to them the lots in St. Anthony's avenue, their occupancy and use of which closes the avenue, and is complained of by plaintiff. Indeed, it is apparent from the whole evidence that plaintiff's title is of the same character, and derived from the same source, with those which have conferred whatever rights are enjoyed by any one in this well-filled city of the dead, certainly since the death of the corporation *eo nomine*. The plaintiff tells us that he bought in 1857, by the plan filed in evidence, the correctness of which is admitted; that St. Anthony's avenue was then open, and he selected his lot because it was a corner lot, and could have bought others at the time for less money. Father Allen tells us this is the only plan transmitted to him; and that it is the only plan of the cemetery is not controverted.

And while the precise date of its execution is not shown, it is evident that it was in existence some time before 1857, probably as early as 1854, and that all sales of lots have been made by it till the near exhaustion of lots induced the church authorities to attempt the closing of this avenue. If they have such power, and can confer rights upon and induce others to occupy the avenues, it may well be asked where is the exercise of this power to stop. Perhaps the present or some succeeding priest may consider it proper to close still other avenues, until the beauty and plan of the cemetery and the convenience and rights of existing lot owners may be entirely sacrificed.

The evidence of both plaintiffs' and defendants' witnesses shows what is apparent from the plan, that the closing of St. Anthony's avenue will double the distance in approaching plaintiff's burial lot from the Canal-street entrance, within twenty feet of which the cars stop, and by which most persons visiting the cemetery enter, and according to some of the witnesses, though partly contradicted by the priest, through which bodies are often carried for interment. One witness also says "the Canal-street

entrance is the usual entrance for funerals." It is evident that plaintiff will be put to inconvenience at least, and that whatever be the nature of his rights or of his contract with the church, it has been violated by the closing of St. Anthony's avenue with the assent of the church authorities, and he is entitled to the protection of the law. The defendants are either mere trespassers, or holding under and from St. Patrick's church.

Under the facts of this case the church itself could not close these avenues, or render their use more inconvenient, if objected to, so long as the ground is used as a cemetery. And the defendants are in no better position, to say the least of it. C. C., article 777.

The plan of the cemetery has the word "entrance" over the Canal-street entrance, and it appears from the evidence that the gate, which is similar to that on the Bayou road, has been closed within the last two or three years, while the plaintiff states in his evidence that the "opening" or entrance has been there as long as he recollects going to the graveyard, which was doubtless even earlier than the time of his purchase in 1857. That not only the plaintiff but the other lot owners and the general public have for many years used this entrance, and the avenues within, including St. Anthony's; is clearly shown, and has not been controverted by either evidence or argument.

It further appears by reference to the act of incorporation of the Roman Catholic church of St. Patrick's, sessions acts of 1833, that the cemetery was to be and remain subject to the control of the city authorities of New Orleans if within its limits, otherwise to that of the police jury of the parish of Orleans. This fact, coupled with the plan, the open entrance place, and their long-continued and habitual use of the avenue, at least by the general public, as well as by the lot owners, would come very near constituting a dedication of them to public use, and would certainly do so to the use of the lots and those holding them, whether their titles be absolute or qualified, or right to the soil or in and over it. If this constituted a dedication to public use, it is well settled that that dedication may be shown by parol. *Pickett vs. Brown*, 18 An. 560; 21 An. 244, and numerous other cases.

In 9 An. 445, it was held that where a property owner made a plan representing various lots on either side of an alley and sold lots on one side according to the plan, that alley constituted a servitude, not merely for the lots sold, but for the property on both sides of it.

In the case of *Rogers vs. McGinnis*, 12 An. 108, it was held that a right of way accompanied by possession can be established by parol, even without a plan, in favor of the adjoining property for the convenience or necessity of which it has been used. But is said that none but

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the owner of property or his authorized agent can create a servitude upon it. The answer here is—

First—A plan of the cemetery, which is traced back beyond the knowledge or memory of the witnesses, who testified to its existence for over twenty years in the hands and keeping of the priests of St. Patrick's church, the congregation of which was and is owner of the soil, except so far as they have made titles to it.

Second—The habitual use of the place by the recognized authorities of the church during all these years, and the making sales of lots in the cemetery.

Third—The long-continued and habitual use, occupation, and enjoyment of the cemetery and its lots, according to this plan, by the members of the congregation itself and its priests and officers, and of the avenues marked on the plan, not only by them but by the general public.

Fourth—The well-known and established custom of the congregation to act in the control of the cemetery and the sale of burial lots in it through and by its priests. See evidence of Father Allen, who testifies directly to this effect, and also of the other witnesses.

Fifth—The written title or act of sale to the plaintiff and the testimony, received without objection, of numerous similar sales to other parties.

All this could not have been done without the knowledge and concurrence, if not the direct authority, of the congregation of St. Patrick's, who, in the language before quoted from the case in 2 Peters, did not question the authority of the priests, who formed part of the society or congregation. Under all these circumstances, were it the congregation itself which was questioning or interfering with the exercise of plaintiff's rights, instead of persons who have intruded recently upon his long-time possession and enjoyment of his property and the avenues of approach to it, without setting up any title in themselves, we should regard the congregation itself as estopped from such interference as is complained of, certainly so long as the cemetery continues to be used as such. It can not be that either law or good faith will permit persons to be induced on the faith of agreements, whether titles or not, or whether written or not, to deposit on or in the grounds of another the ashes of their valued dead and with commendable piety and affection to erect costly monuments to their memory and honor, and then that either the expressed or implied conditions of the agreement shall be broken and disregarded with impunity. This would be a clear case of estoppel by conduct. Still less can it be said that the plan and convenience of access to the tombs of a cemetery through its accustomed avenues can be impaired or obstructed by strangers without title, and setting up none, and

long-used rights taken away, and that the law gives no remedy. To hold otherwise would do violence to the peace of society, to our sense of right, and to that necessary and wholesome rule, before quoted, that the possessor, whether in good or bad faith, is considered provisionally as owner against all the world except the true owner. The appropriate and peaceful remedy is the one to which the plaintiff has resorted in this case, that of injunction, to stay and to undo the mischief. C. P., article 298, paragraph 5, expressly authorizes injunction when the plaintiff is disturbed by the defendant in "the actual and real possession which he has had for more than a year, either of a real estate or of a real right of which he claims the ownership, the possession, or the enjoyment." It is not ownership or title alone, then, which can be thus protected and preserved, but "possession and enjoyment" likewise. And here it may be well to remark that it is not the "ownership, the possession, or the enjoyment" of plaintiff's burial lot and tomb which are the real matters in controversy in this case, but the right and enjoyment of passage through and over St. Anthony's avenue, which he in common with so many others has possessed and enjoyed through so many years without interruption till the acts of defendants complained of, a right which for all the purposes of this case might be independent of his title to or ownership of the lot itself.

The case has been argued as though such title were necessary. We do not think so, and certainly not in a case of this character, against persons who have acquired no right of possession, and who set up no title in themselves.

We have examined the authorities cited by the brief of the learned counsel for the defense (except one or two which neither they nor we have been able to find) in support of the proposition that the act of sale to plaintiff gave no right of ownership, no proprietary right in the land, and conveyed but the right of sepulture, which is held subject to the right of the cemetery owners to remove the cemetery under certain conditions by remunerating the lot owners for their deprivation. As no such right of removal of the cemetery is or has been exercised or attempted in the case at bar, and as the cemetery owners are not parties to this record, that question does not arise here, and whatever rights the plaintiff acquired by his deed of purchase or otherwise still exist. All of the cases referred to are cases of the exercise of the right of removal of the cemetery by religious corporations or associations, by virtue of which the cemetery ceased to be used as such, a case which frequently arises in crowded populations, and even then it is required that compensation be made to the lot owners, or an equally good place of sepulture be afforded them, which of itself is a recognition of their right, defeasible and terminable only by the happening of the event or contingency named.

Burke vs. Wall.

In *Kincaid's Appeal*, 66 Penn. and 5 Am. Rep., the court held that the lot owner in a cemetery purchased a license—nothing more—*irrevocable* so long as the place continued a burial ground, but giving no title to the soil. Whether it was an incorporeal hereditament descendible from him or passed to his personal representatives, it is unnecessary to decide. While the license continued he could, perhaps, bring trespasser case for any invasion or disturbance of it, whether by the grantor or by strangers.

In 5 *Barbour*, 131, the court held that the sale of a pew in a church is a sale of an interest in real estate. In 109 *Massachusetts Rep.* 1, the court held "the removal of tombs and bodies by order of the church authorities to a new place of sepulture was no violation of the rights of property, if provision is made for compensation." This was a case of abandonment of the old and removal to a new cemetery by the church authorities, and the court said further, "it is not necessary to decide the class of property, whether mere license or not." 4 *Sandford's Ch. Rep.*, 471, was a case of injunction against the church authorities to prevent removal of bodies to another cemetery, and no title had passed to any vault or portion of ground. The case of *Brice vs. Methodist Episcopal Society*, 4 *Ohio Rep.*, 515, holds that the interests of persons having the right of burial assimilates that of pew-holders, which is limited and usufructuary," and that the party acquires only a qualified right of property. The court, however, fully recognizes the authority of *Beatty vs. King*, 2 *Peters* 566, to which we shall presently again advert, and says: "We should incline to restrain them (the church society) from any wanton breaking up of graves." 32 *Barb.* p. 42-47, distinguishes between the right of burial in a church-yard and that "in a separate and independent cemetery," and says in the former case "it is an easement and not a title," thus implying that in the latter it is more than an easement, that it is a title. In the same case the court says: "Any deed of conveyance, whether of a pew, or a vault, or a house, is a contract between the parties, to be interpreted according to their actual or fairly presumed intent." In the case of *Beatty vs. King*, 2 *Peters* 566, where, as in the case at bar, the disturbance complained of was at the hands of a private person and not of the church, the court held that "the law protects tombs and rights of interment from sale or disturbance," and that "the remedy is by injunction to preserve the ashes of the dead and the religious sensibilities of the living," and that "any member of a voluntary society may sue, having a common interest for purposes common to all and beneficial to all."

It will be remembered that article 456 Revised Civil Code, 447 of Old Code, provides that "the provisions of the ancient laws concerning the distinction of things into things holy, sacred, and religious, and the inalienability of these kinds of things are abolished; and nothing pre-

vents the corporations or congregations to which these things belong from alienating them, provided it be done in the manner and under the restrictions prescribed by their acts of incorporation."

What, then, was to prevent the congregation of St. Patrick's Catholic church from selling an interest in or part of the soil of the cemetery? The language used in the deed to plaintiff, after reciting the consideration, is: "I have sold and by these presents do sell and convey to Mr. Nicholas Burke a certain lot of ground as a family burial-place," "to have and to hold the same for himself and heirs forever." Then come the conditions of the sale, that "the lot shall only be used as a family burial-place, and that none but such as depart this life in communion with the Roman Catholic Church shall ever be interred therein."

How would such a sale or contract be interpreted if made between private persons or of property other than that of a religious body? and if the law makes no distinction, how can the courts make it?

But under the views already expressed it is unnecessary for us to go so far in the present case, and it is a sufficient answer to all the authorities as to the character of the plaintiff's rights cited by the learned counsel for the defense that not only absolute but qualified property is under the protection of the law, and that "not only servitudes but leases and all other rights which the owner has imposed on his land" form real obligations, and constitute real rights, C. C., 2015 and 2012, for the disturbance in the ownership the possession or the enjoyment of which the claimant may resort to the remedy of injunction. See again paragraph five of article 298 C. P., before quoted.

The peculiar and unusual character of this case, its to some extent public importance, the zeal with which it has been argued on both sides, and the fact that it has been the subject of two former and contradictory decisions, one against the plaintiff by the court below, and the other in his favor by our immediate predecessors, who also granted the present rehearing, have induced us to give the case a more lengthy examination and elaborate review than our own views of the case would have rendered necessary.

For the reasons assigned it is ordered that the judgment of the court below be avoided and reversed, and that the injunction of plaintiff be perpetuated, with costs of both courts.

Savole vs. Thibodaux.

No. 6526.

JOURDAIN SAVOLE, ADMINISTRATOR, vs. P. A. THIBODAUX.

Where the defendant, who has been cast, fails to appeal, or to join in the appeal taken by the plaintiff, and thereby acquiesces in the judgment, he can not, after this court has affirmed the judgment and the plaintiff proceeds to execute it, enjoin its execution: even though it appear that the plaintiff issued his *feri facias* before the judgment of this court was filed and recorded in the court below.

A PPEAL from the Fifteenth Judicial District Court, parish of Lafourche, *Beattie, J. J. S. Goode*, for plaintiff and appellant. *C. Knobloch*, for defendant.

The opinion of the court was delivered by **SPENCER, J.**

It appears from the record and statement of facts in this case that the plaintiff, as administrator, holding certain notes of defendant, secured by mortgage and vendor's lien, proceeded *via ordinaria* to obtain judgment therefor and a decree of foreclosure. On the judgment thus obtained a writ of *feri facias* was issued, and the mortgaged property seized and advertised for sale. Defendant sued out an injunction, claiming a credit of four hundred dollars on the judgment and execution. The court below perpetuated the injunction to the extent of the credit claimed, and dissolved it, without damages, for the balance. From this judgment the plaintiff, Savole, alone appealed. On the fourteenth of February, 1876, the Supreme Court rendered its decision affirming the judgment of the lower court. The sheriff, pending the injunction and appeal, of course, suspended proceedings under the writ, returning the original and retaining a copy at the end of seventy days, as the law directs. On the twenty-sixth of February, 1876, the sheriff again advertised the property for sale on the first of April, 1876. On the morning of the thirty-first of March, 1876, the attorney of defendant in execution called at the clerk's office and was informed that the decree of the Supreme Court had not been received or filed. At noon of that day (thirty-first of March) the opinion and decree was received and filed in the clerk's office. It is also admitted that the credit of four hundred dollars allowed by the district and Supreme Courts was indorsed on the execution on the thirty-first of March, 1876.

On the evening of the thirty-first of March the defendant in execution (P. A. Thibodaux) filed another injunction, in which he alleges and recites the history of the case, and that the plaintiff, Savole, had taken an appeal to the Supreme Court, and that the mandate and decree of said court had not been "returned, filed, recorded, or spread upon the minutes of the clerk's office of the district court," and that notwithstanding this fact, the plaintiff and sheriff were proceeding to offer said property for sale again, and had advertised it for sale on the first Saturday of April, 1876.

made other charges of irregularity which were abandoned in the lower court and not insisted upon here.

The sole ground upon which defendant in execution rests his injunction is the prematurity of the proceeding. He does not allege or pretend that the plaintiff was seeking to sell the property for more than was due under the judgment of the district court. He admits that the execution was credited with the four hundred dollars allowed by the district court, by indorsing the same thereon on the thirty-first of March, 1876, and as he does not complain of any excess in the amount of the execution, it is fair to presume that he was cognizant of the fact at the time of filing his injunction.

As the defendant did not appeal, or seek to have the judgment changed in his first injunction suit, it is perfectly clear that he had no interest in refusing to pay the amount of the judgment of the district court. He had acquiesced in that by seeking no relief on appeal. The Supreme Court could not have reduced the amount of the judgment of the district court, because defendant had not appealed or asked it. As long therefore as the plaintiff sought to recover by execution only the amount allowed by the district court, the defendant had no right to complain. He could not hope to pay less, because the appellate court had no power or right to decree him to pay less. What injustice, then, was done defendant by the proceeding? He does not pretend that plaintiff was executing his property for more than the amount allowed by the district court, whose judgment as to him was a finality. So far from working him an injustice, it would have been a benefit to him if plaintiff had proceeded with the execution before the decision of the Supreme Court, for then the defendant could have gone into that court and entered a plea that plaintiff had acquiesced in the judgment of the district court by prosecuting its execution. Plaintiff could abandon his appeal at any time, as no change of the judgment was sought by the defendant, and the enforcement of the judgment of the district court before obtaining a judgment on his appeal would have been such an abandonment by acquiescence.

Plaintiff's case can not surely be worse for his enforcing execution after the decision on appeal than it would have been had he sought to enforce it before the decision on appeal. We have seen that he had a perfect right to abandon his appeal and to acquiesce in the judgment appealed from at any time, and to enforce it. By so doing he does defendant no injury, since defendant, himself not appealing, acknowledges thereby the justice of the judgment, and has no right to complain at its execution, and abuses the process of court by enjoining it. This view of the case renders it unnecessary for us to decide whether, where the Supreme Court has simply affirmed a judgment of the court below, and

Bavoie vs. Thibodaux.

the delays for rehearing have expired, and the judgment has become final, it is sacramental that its mandate should be filed and recorded in the court below before proceeding to execute a writ of *habeas corpus* that has been enjoined in the sheriff's hands.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be avoided and reversed. And proceeding now to render such judgment as should have been rendered, it is ordered, adjudged, and decreed that the injunction sued out by the defendant be dissolved and set aside, and that he pay costs of both courts.

No. 6507.

STATE EX REL. HOBY & O'CONNOR VS. J. G. BROWN, ADMINISTRATOR OF ACCOUNTS.

To enable an Administrator of the city of New Orleans to take a suspensive appeal from a judgment against him in his official capacity, he must give bond and security, as the law directs. Only the city itself is dispensed from giving an appeal bond.

APPREAL from the Superior District Court, parish of Orleans. *Lynch, J. Horner & Benedict*, for plaintiff and appellee. *B. F. Jonas*, City Attorney, for defendant.

The opinion of the court was delivered by *MARR, J.*

This suit was brought against J. G. Brown, Administrator of Accounts of the city of New Orleans, to compel him to register a certain judgment in favor of relators against the city of New Orleans, and to issue to relators certain cash warrants.

Brown was the only defendant, and the judgment was against him alone.

"On motion of *B. F. Jonas*, City Attorney, of counsel for the city of New Orleans, and for *J. G. Brown*, Administrator of Accounts," a suspensive appeal was granted to defendants without bond.

Appellees, the relators, move to dismiss the appeal on the ground that the appellant has given no bond, and that he is not exempt by law from giving bond.

The act of 1870, called session, page 44, section 33, provides that "in all judicial proceedings where by law bond and security are required from litigants the city of New Orleans is dispensed with giving bond or security."

The dispensation thus granted by express law, in derogation of the general law which requires all appellants to give bond and security, can not be extended beyond the terms of the law; nor can it be invoked in

State ex rel. Hoey & O'Conner vs. Brown, Administrator of Accounts.

any case in which the city of New Orleans is not a party. State ex rel. George vs. Mount, 21 An. 177.

The city was not a defendant and is not an appellant in this case; and the court below had no authority to grant the appeal without requiring appellant to give bond and security. The motion to dismiss must prevail.

It is therefore ordered, adjudged, and decreed that the appeal herein taken be dismissed with costs.

No. 6341.

JOSEPHINE JOHNSON VS. CLARK & MEADER.

Where the appeal bond is made in favor of the appellee instead of the clerk of the court, it will, on motion to that effect, be dismissed. Nor will any surreptitious interlineation of the bond, made after the motion to dismiss, by which the clerk is substituted for the appellee, avail to prevent the dismissal of the appeal.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J. Gibson & Gibson*, for plaintiff and appellee. *J. Tharp*, for defendants.

The opinion of the court was delivered by MANNING, C. J.

This case was recently remanded to the lower court with directions to try contradictorily with the parties the question of an alleged alteration of the transcript subsequent to its filing in this court.

A motion had been made to dismiss the appeal upon the ground that the bond for appeal was in favor of the appellee instead of the clerk of the court from which the appeal comes. When this motion came up for hearing, the counsel for appellee suggested that the original appeal bond, and also the copy in the transcript, had been altered by interlining the name of the clerk of the court, since the motion to dismiss was filed. Sworn statements of the counsel and others were presented verifying this suggestion of alteration of the record. Upon this, since original evidence is not adducible in this court, and the appellee should not be deprived of the relief to which she claims to be entitled because the records have been tampered with, the order to remand for the purpose of trying this question alone was made. The record of that trial is now before us, as well as the original suit.

The judge of the lower court now certifies to us that the appeal bond was altered by the insertion of the name of the clerk after the bond had been filed in the lower court, and after the transcript had been filed in this court; that the transcript of the suit was also altered by the insertion of the name of the clerk in the appeal bond as copied therein after it was filed in this court, and the judge was of opinion and so adjudged that the name of the clerk of the lower court was inserted by interline-

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ation both in the original appeal bond and in the transcript after that transcript had been filed in this court.

So grave a matter requires of us the closest examination and the clearest elucidation. We have therefore examined the evidence in its minutest detail, and we find that it justifies the judgment of the lower court.

Mr. Mackinley Gibson, the attorney of the appellee, swears that the appeal bond was made in favor of the plaintiff, Josephine Johnson, and no one else, on the eighth of May, 1876; that after the bond was executed and filed he obtained the papers in the suit, carried them to his office, and there pointed out to Mr. G. L. Hall that feature of the bond; that he retained the papers in his office until the Friday preceding the Monday which was the return day of the appeal, when he delivered them to the attorney of record of the defendants upon his applying for them; that before thus delivering them he again examined the bond, and again exhibited it to Mr. Hall, both of whom saw that it was unchanged; that on fifteenth of same month, which was the return day, he went to the clerk's office of the Supreme Court and examined the transcript which had been filed, and that it was a correct transcript of the bond as executed, being payable in favor of plaintiff only; that he called the special attention of Mr. Julien, the deputy clerk of this court, to the form of the bond as copied in the transcript, saying he intended to base a motion to dismiss upon its informality; that he then went to the clerk's office of the Fourth District Court, and inspected the original bond again, and it was unaltered, and he then made a copy of it himself, and on the next day filed his motion to dismiss on the ground that the bond for appeal is not in favor of the clerk of the lower court. It was not until several months afterward he discovered upon a re-examination of the transcript that the name and designation of the clerk of the lower court had been interlined in the transcript of the bond, and immediately proceeding to that court-room he found the same interlineation had been made in the original bond.

Mr. Hall confirms this testimony touching the exhibition of the bond to him, and his examination of it, and subsequently of the transcript. Mr. Julien, the deputy clerk of this court, testifies that his attention was pointedly directed to the appeal bond as copied in the transcript, and that the name of the clerk was not then inserted or interlined therein; that the transcript was then on file in the clerk's office of this court, and the interlineation was made after the filing, and after the motion to dismiss had been made. George Caselar, the copying clerk of the Fourth District Court, swears that after the bond was filed in that court he made a copy of it for Mr. Gibson, and the name of the clerk of that court was not then in the bond, and he remembers that fact distinctly.

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because he remarked it to Mr. Gibson, who replied that was the reason he wanted the copy made and certified. Mr. Palms, the minute clerk of that court, identifies that certified copy as a correct copy of the bond as originally filed. Edward De Blois, the clerk of the lower court, says he certified the transcript which was brought to him for that purpose by Mr. Chalon, who had charge of his office, without examining it, and Mr. Chalon is dead. John M. Meilleur then appears on the scene and informs us that he made the transcript, having been engaged by Mr. Chalon to do it. The body of the appeal bond is also in his handwriting, and so also are the interlineations both of bond and transcript. He was thus interrogated :

"Do you remember what day you put the interlineation in?"

Answer—"I could not remember the day or date, but I remember very well. I think it was the day before filing the transcript or the day after, I am not sure, either Friday or Saturday or Thursday," and afterward replying to a similar question, says the interlineation was made in the transcript either on the day of filing or the day before.

When questioned as to the time when the interlineation of the bond was made, says that it may have been the day after, but afterward he can not say it might not have been a month or two months after it was filed. He had stated that he made the transcript and wrote the bond in the office of the attorney of the appellants, and afterward corrected himself, and said it was written in the office of the clerk of the Fourth District Court, whereupon the attorney of the appellants on cross-examination called on him then to state which place was the one where he did write the whole bond, and he answers "in your office;" and finally at the conclusion of his examination avows that the interlineations were made with the knowledge, consent, and approbation of Mr. Chalon.

Mr. W. E. Murphy then testifies to his knowledge of Mr. Chalon, and declares that he was incapable of authorizing Meilleur to alter the records as sworn to by him. He was an experienced clerk, and knew his duties—an honest man who felt his responsibilities.

It did not require testimony of the character of the deceased Chalon or of his business habits, or of the possibility of his acting in a certain way in certain circumstances, to convince us that the interlineations of these records were not made at the time and under the circumstances mentioned by Meilleur. The testimony of all the parties whose business and interest was to examine and remember the facts leaves nothing to be desired for the completion of the proof. We find that the interlineations, both in the original bond and the transcript, were made after that transcript was filed in this court, and after the motion to dismiss was filed.

We should not discharge our whole duty while these facts are brought

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under our immediate cognizance, were we to omit calling the notice of the proper officers to these developments of the trial below, and we accordingly direct the attention of the Attorney General to them, in order that he and others whose duty is to search out and prosecute offenders, may institute the proper proceedings to ascertain whether the acts of any of the parties implicated by these disclosures make them amenable to the criminal laws. The sanctity of judicial records should be vindicated, and tamperers be taught by example, that the integrity of these records may not be violated with impunity.

Our function now is to thwart the attempt to defeat the course of law in the present suit. When the motion to dismiss was filed, the bond in its then condition justified it. Its subsequent alteration shall not prejudice the rights of the appellee, and it is therefore ordered that the appeal be and it is hereby dismissed at the costs of appellants.

No. 5295.

L. HEYNIGER & CO. VS. A. HOFFNUNG ET AL.

The whole object of a rule *nisi*, in matters of injunction, is to enable the defendant to show, if he can, that on the face of the papers, the injunction ought not to be granted. On the trial of the rule, no affidavit from either side, bearing on the truth of the allegations of the petition, will be admitted in evidence.

The refusal of the court, on a rule *nisi*, to grant an injunction, may be appealed from.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J. Bace, Foster & E. T. Merrick*, for plaintiffs and appellants. *Labatt, Aroni & Clinton*, for defendants.

The opinion of the court was delivered by MANNING, C. J.

Plaintiffs presented a petition to the judge of the Sixth District Court of New Orleans, accompanied by an affidavit and bond, praying the issuance of an injunction against the defendants. The judge ordered the clerk to issue a rule *nisi*, returnable in three days, upon the defendants to show cause why an injunction should not issue.

Upon the trial of the rule defendants offered in evidence several affidavits, the object of which was to show that the allegations of the petition were not true. Plaintiffs objected to their reception, on the ground that they went to the merits of the case, which they allege were not then before the court, and, on being overruled, took their bill of exceptions in form. The court discharged the rule *nisi* and refused the injunction, and from that judgment plaintiffs appeal.

The decision must depend on the answer which shall be given to the question: What is the nature, purpose, and scope of the rule *nisi*?

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The plaintiffs insist that there is no law authorizing our courts to issue any rule *nisi* for any purpose upon an application for an injunction, and invoke serious consideration of the question whether the introduction of that practice by a rule of court is permissible. They contend that upon filing a petition, affidavit, and bond with good and sufficient security for such sum as the court shall prescribe, an injunction must be granted, provided the petition discloses a case warranting its issuance, which is left to the legal discretion of the court to determine.

Premitting the expression of an opinion upon that point, and merely observing that no rule of a court can make obligatory upon a plaintiff an imperative requirement which the law has failed to impose, we shall sufficiently respond to the issue here made by saying that the object of the rule *nisi* is to give an opportunity to the defendant to show that an injunction is not allowable on the face of the papers, or in other words, that the facts and allegations contained in the petition are not sufficient to warrant the court in issuing the writ. Any examination of the merits on the trial of that rule is premature. In the present case the court had before it the petition and affidavit of plaintiffs' attorney, his clients being absent, that their allegations were true, and opposed to that was the affidavit of defendants' attorney, his clients being also absent, that the allegations of the petition were not true, which last was supported by numerous other affidavits of the same tenor. These affidavits were inadmissible, and should not have been received or considered by the court, and the bill of exception of plaintiffs was well taken.

The counsel for plaintiffs assimilate the proceeding by rule to the motion to dissolve an injunction on the face of the papers, which is in the nature of a demurrer, and admits for the purposes of the motion all the alleged facts to be true. The defendants in the rule make the distinct issue that the facts and allegations are not true. It was held that a "motion to dissolve an injunction on the ground that the allegations in the petition are not true must be referred to the merits." *Williams vs. Douglass*, 21 An. 468. So we think an answer to the rule *nisi* denying the truth of the allegations is in effect an answer to the merits, and can only be heard after the injunction has issued, and upon the trial of the merits.

Our attention has been directed by the defendants' counsel to the case of *Newgass vs. the Judge of the Superior District Court*, very recently decided, as sustaining their position, assumed in oral argument, that no appeal lies from a refusal of the lower court to grant the injunction, but that decision does not go so far as that.

The court, after remarking that the case of the *State vs. Lewis*, 7 Martin, 457, is the only instance in our reports in which an appeal from a refusal to grant an injunction was declared to be allowable, say that

Heyniger & Co. vs. Hoffnung.

in Newgass's case the judge had simply refused to grant an *ex parte* order upon an *ex parte* showing, and therefore there was nothing for this court to revise. The judge rendered no judgment and made no order, and hence there was no ground for an appeal. And further on, at the conclusion of the opinion, it is said: "Had what is called a rule *nisi* been taken, and after the hearing the judge had refused the injunction, * * * a different question would be perhaps presented." 27 An. 672.

That is the question presented in this case. The judge of the lower court erred in receiving testimony which was applicable only to the merits of the case, and which can only be heard on the trial of the merits. In overruling his decision we can not order that an injunction be granted, because that would be to assume original jurisdiction, but it is our duty to remand the case in order that he may consider and determine whether the facts and allegations contained in the petition, and the affidavit and bond, are sufficient to justify the issuance of the writ prayed for. Should he then refuse the injunction, his action can be reviewed by this court.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court is avoided and reversed, and the suit be remanded thereto for further proceedings according to law, the appellees to pay costs of this court.

No. 6523.

STATE EX REL. P. BOURON VS. JUDGE OF THE FIFTH DISTRICT COURT.

A judgment was rendered in *concurso*, without fixing the amount due to each claimant. Afterward, one of the creditors, on a rule for that purpose, obtained a decree fixing the sum due him, which was over five hundred dollars. One of the parties in interest applied for a suspensive appeal. It was refused, on the ground that the decree was an interlocutory one.

Held—That the decree was final, and that from all final decrees, where the sum involved is over five hundred dollars, a suspensive appeal lies.

APPEAL from the Fifth District Court, parish of Orleans. *Cullom, J. H. D. & Charles G. Ogden*, for relator. *Hornor & Benedict*, for respondent.

The opinion of the court was delivered by MARR, J.

In the suits of Samuel Lee vs. F. F. Kendall, No. 4815; and Philip Bouron vs. the same, No. 4816, certain property was seized and sold under executory process, and the proceeds were in the hands of the civil sheriff for distribution. Interventions and third oppositions were filed by several persons, among others, Peter Markey, claiming privileges on the proceeds. The suits were consolidated, and, in June, 1876,

State ex rel. Bouron vs. Judge of the Fifth District Court.

a judgment was rendered, fixing the rank in which the creditors were to be paid, from which judgment a devolutive appeal was taken.

This judgment, rendered *in concursio*, did not fix the amount to be paid to Markey, and on the twenty-first of July, his counsel, suggesting to the court that the judgment in his favor was final and executory, and that he had demanded of the civil sheriff payment of the amount due him out of the proceeds in his hands, which the sheriff refused, and to which the plaintiffs in the suits refused to consent, moved a rule on Bouron, Lee, and the sheriff, to show cause why the costs should not be fixed according to law, "and why the sheriff should not be ordered to pay the intervenor the sum of six hundred and fifty dollars out of the proceeds of sale herein with costs of this rule."

On the twelfth of September judgment was rendered on this rule, signed on the twelfth of October, by which "it is ordered that the said rule be made absolute, and, accordingly, that the costs herein be taxed according to law, and that the sheriff be ordered to pay to Peter Markey, intervenor herein, the sum of \$610 76 out of the proceeds of sale herein with costs of this rule."

Bouron, by petition, took a suspensive appeal from this judgment, and Markey moved to set it aside, which was done on the grounds that the judgment was interlocutory and not final, and that judgment having been rendered on the merits in favor of Markey, and plaintiff not having appealed suspensively from that judgment, can not stay and prevent the execution of the *feri facias* upon that judgment by an appeal as attempted. Bouron prays this court to grant a writ of mandamus, requiring the judge of the Fifth District Court to recognize and allow the suspensive appeal taken by him and a writ of prohibition forbidding the said judge from further proceeding in the cause and from causing the execution of the judgment appealed from.

It is manifest that something remained to be done after the judgment *in concursio* before Markey could demand of the sheriff any precise amount, and the judgment on the rule of the twenty-first of July, the judgment appealed from, did that which no other judgment in the cause has done—it not only fixed the amount, but ordered the sheriff to pay that amount, \$610 76, out of the proceeds in his hands. This judgment is final between the parties, and it disposes of the whole controversy.

In determining whether a party is entitled to appeal from a judgment no inquiry can be made as to what may be the effect of that appeal upon another judgment, rendered at a different time, between the parties in the same cause. The questions are: First—Is the judgment from which an appeal is demanded final? Second—Is the amount in controversy above the sum of five hundred dollars.

State ex rel. Bouron vs. Judge of the Fifth District Court.

First—We have here a judgment which terminates the controversy, and it is signed by the judge. It is therefore a final judgment in every sense of the term.

Second—This judgment is for \$610 76, which is above the appealable amount.

All that the constitution requires for the complete jurisdiction of this court is realized and exists in this case, and the relator is entitled to the relief which he asks at our hands.

It is therefore ordered, adjudged, and decreed that the writs of mandamus and prohibition herein issued be made peremptory as prayed for, and that the respondent pay the costs of this proceeding.

No. 5425.

R. N. OGDEN VS. A. MARCHAND.

The holder of a negotiable note, who has bought it in good faith, and before its maturity, acquires a valid title to it, though it be shown that the vendor of the note was not its owner, and had fraudulently disposed of it.

Where an agent has fraudulently sold his principal's property, and embezzled its proceeds, and the principal afterward accepts from the agent something in compensation for the embezzled proceeds, he thereby ratifies the sale made by the agent, and estops himself from any recourse against the innocent purchaser of his property.

APPEAL from the Fifth District Court, parish of Orleans. *Cullom, J.*
S. P. Blanc, for plaintiff and appellant. *Hornor & Benedict*, for defendant.

The opinion of the court was delivered by MANNING, C. J.

Plaintiff sues to recover a note for eight thousand dollars, dated November 4, 1872, and payable one year thereafter to his own order and by him indorsed, which was secured by mortgage executed simultaneously with the note by E. B. Livaudais, and which, says the act of mortgage, was "handed over to said Livaudais, present and acknowledging receipt thereof." He alleges that this note is in the possession of the defendant, who obtained it in bad faith, and under circumstances in themselves suspicious, and calculated to put him on his guard; that the note had been left by him in the possession of the notary who drafted the act of mortgage, for sale and delivery through petitioner's brokers to one Rochereau; but that A. D. Voisin illegally and wrongfully took possession of the note, used it for his own purposes, and fraudulently delivered it to the defendant, whom he charges with knowledge of Voisin's condition, and of his purpose to defraud plaintiff.

Defendant pleads the general issue, and specially avers that the note is negotiable commercial paper, transferable by delivery, and that he

purchased it for a valuable consideration, in good faith and without suspicion of any defect of title, before maturity. He also avers that plaintiff has received a consideration for the note.

It appears that the purpose of plaintiff in executing the note and mortgage was to take up a note of two thousand dollars which was secured by mortgage on his lots, and also to obtain a loan, and his intention was to have that note and the mortgage which secured it canceled before the mortgage now before us was recorded. Voisin & Livaudais, a firm of brokers, were employed by him to carry out this purpose. The mortgage was executed in favor of and accepted by E. B. Livaudais, one of the members of that firm, and the note went into their hands. Two days afterward, viz.: on the sixth of December, the firm was known to be ruined, and Voisin had disappeared. Shortly after, plaintiff learned that his note for eight thousand dollars was in possession of the defendant, and his note for two thousand dollars was unpaid and outstanding against him.

Most of the testimony is directed to the attempted proof by the plaintiff of bad faith on the part of the defendant, and of the latter's knowledge of the fraud perpetrated by Voisin, and of the precarious condition of the firm of Voisin & Livaudais, but it is manifest that the defendant had not ceased to believe in their solvency and fair dealing, as he was about to enter into a new transaction with them, and the plaintiff evinces his own confidence in them by trusting them with a negotiation of his own mortgage note.

The defendant rebuts the charge that this note was received by him from Voisin in part payment of an indebtedness by the latter of twenty-seven thousand dollars or thereabouts, by the proof that he paid for the note, and produces the check for sixty-five hundred dollars on the Citizens' Bank, dated December 5, 1872, in favor of Voisin & Livaudais, which conforms both in date and amount to the other proof of the negotiation and purchase. But it is not necessary to apply here the universally recognized doctrine that the purchaser of negotiable paper before maturity acquires a good title, because, admitting all that the plaintiff alleges, he subsequently treated the defendant as the *bona fide* holder of the note by accepting from Livaudais a composition of the claim he had against the firm of Voisin & Livaudais by reason of this sale or transfer of the note to defendant. Livaudais gave plaintiff pledges from which he realized twenty-six hundred dollars, and mortgage notes upon two pieces of property for the residue of his claim against the firm. This was a condonation, so to speak, of Voisin's alleged fraud, and a settlement of the indebtedness occasioned by his illicit act, and this receipt and sale of pledges, and of the transfer of the mortgage securities, precludes the idea that the note held by Mar-

Ogden vs. Marchand.

chard was expected at that time to be recovered, and is in fact and in law a bar to that recovery.

It is true it turned out afterward that the securities thus received were worthless, because the mortgage securing them was primed by others for the full value of the property. But that should have been ascertained by plaintiff at or before his acceptance of them. He can not confirm and ratify Voisin's act by making a settlement with the firm, in which it appears he was assisted by Marchand, and afterward disown the settlement and proceed against the latter. Besides, if that settlement was merely provisional, as plaintiff attempts to show, he should have returned the money and securities received by him from Livaudais before or at the instant of renewing his claim against Marchand for the note. He did offer to give Marchand the securities, but we find no mention of any offer to give him the money received from the sale of the pledges.

It is not equitable that the defendant should suffer from the misplaced confidence of the plaintiff in the brokers to whom he had intrusted the negotiation of his paper, and the plaintiff has no cause to complain, since he voluntarily treated the brokers as his debtors for the amount realized by them from the negotiation.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court is affirmed with costs in both courts.

No. 5141.

PAUL MACK VS. C. E. FORTIER ET AL.

The maker, and the indorser of a promissory note, although not technically debtors *in solido*, are yet liable, each, for the whole debt.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J. J. H. Grover*, for plaintiff and appellee. *N. H. Rightor*, for defendant.

The opinion of the court was delivered by SPENCER, J.

This is a suit against Charles E. Fortier as maker and John Sbisu as indorser of a promissory note. The defense is a general denial by both defendants.

Upon trial there was judgment for plaintiff against both defendants *in solido*.

Defendants moved for a new trial, on the ground that the judgment erroneously condemned them *in solido*. The motion was refused, and defendants took this suspensive appeal.

The maker and indorser each owe the whole amount of a negotiable

promissory note to the holder, and he may pursue either or both for the whole. This may not be technically a solidary obligation, but plaintiff was entitled to a judgment against each of them for the entire debt, and that end is secured and expressed by the words "judgment in *solido*."

No damages are asked for frivolous appeal.

The judgment is affirmed with costs in both courts.

No. 6114.

P. E. BRIANT VS. G. LYONS, SHERIFF, ET AL.

The homestead act, which exempts one hundred and sixty acres of land, etc., from seizure and sale, is in favor of a debtor who owns the land, and who has a family dependent on him for support. The benefit it confers is strictly personal. It is likewise in derogation of common right and, hence, does not descend from the debtor in favor of his widow, or his children.

APPEAL from the Fifteenth Judicial District Court, parish of Terrebonne. *Beattie, J. N. H. Rightor*, for plaintiff and appellant. *Gooile & Winder*, for defendants.

The opinion of the court was delivered by MANNING, C. J.

The plaintiff executed a mortgage on the twelfth of April, 1873, to secure Nalle & Cammack, and other parties, the payment of four notes, each for \$2222 22, with interest. The property mortgaged is the sugar plantation of plaintiff in the parish of Terrebonne, and contains 417 acres of land. After the maturity of the notes, and upon their non-payment, executory process was issued at the instance of Nalle & Cammack, who had become the holders of all of the notes, and on the seventh of March, 1874, Briant, the debtor and mortgagor, enjoined the sale of a part of the mortgaged property, viz.: 158 acres, upon which is situated his residence, upon the ground that he is "a married man and the father of a family dependent upon him for support; that he occupies as a residence and *bona fide* owns the dwelling-house and out-buildings and residence appurtenances upon the lower portion of the plantation," which does not exceed two thousand dollars in value, and that such part and quantity of his property is exempt from seizure and sale.

Defendants answer that the property, the sale of which is enjoined, exceeds in value the sum above mentioned, and that Briant specially and expressly waived and renounced any and all exemptions in favor of debtors under the homestead laws, and prays a dissolution of the injunction with damages.

When the litigation had reached this point, the plaintiff died, and on April 19, 1875, his widow, as administratrix of his succession, filed a sup-

Briant vs. Lyons.

plemental petition, making herself a party to the suit in her representative capacity, and renewing the prayer of the original petition, to which defendants reply, that if the debtor had any right to the exemption claimed, it did not survive him in favor of the representative of his succession.

The act of 1865, called in common parlance the homestead law, exempts from "seizure and sale under execution one hundred and sixty acres of ground and the buildings and improvements thereon, occupied as a residence and *bona fide* owned by the debtor, having a family * * * dependent upon him for support." Acts of 1865, p. 52; Revised Statutes of 1870, section 1691.

The debtor in this case is Paul E. Briant, who is dead, and who no longer fulfills, or can fulfill, the requirements of the act. The property exempted must be owned by the debtor and occupied as a residence, and he must have a family dependent on him for support. It can be plausibly urged that the intention of the act was to provide a home for the debtor and his family, with sufficient land to insure them against want, and that this beneficence of the Legislature will be defeated and will be inoperative if, his death occurring during the pendency of the litigation touching the homestead exemption, no right survives to his representative to continue that litigation, and enforce, in behalf of those who were dependent on him for support, the law provided for himself. The family will thus be left homeless when a home is most needed, and the fruit offered by the lawgiver to the poor debtor will be turned into bitter ashes before his poorer family.

Such an appeal would be addressed to our compassion and benevolence. It is our judgment that is invoked in legal contestations. It is a well-settled principle that laws of the nature of this homestead act are in derogation of common right, and can not be enlarged by construction. It may well be doubted whether such laws, like most indiscriminate charities, are beneficial to the general public, or even to those for whose relief they are specially designed. However that may be, we can not apply the act to any other than those designated descriptively in it, and the representative of Briant's succession does not come within its terms.

In *Calvit vs. Hoy*, decided in 1874, and not reported, the plaintiff was a woman who during her widowhood had acquired by purchase the land the exemption of which was claimed, and who was the head of her family with two children, alleged and held to be dependent on her for support. Her claim of the benefit of the exemption was sustained. Opinion Book No. 43, p. 358.

That case is easily distinguishable from the one at bar, for here the widow does not own the property, neither is she suing in her personal capacity, but as representative of a succession to enforce a personal and

inchoate right of the decedent, which was imperfect and unestablished at the moment of his death.

Another law makes another provision for the widow of a decedent who is in necessitous circumstances. Another forum than that from which this appeal comes must hear that claim, and if we may assume that the mortgaged property is all that enters into the effects of the succession, such claim could not be satisfied without its sale, nor until the proceeds are ready for distribution.

The judgment of the lower court was that the injunction be dissolved without damages, and it is now ordered, adjudged, and decreed that the judgment of that court be and it is hereby affirmed with costs.

DE BLANC, J.—On account of affinity, I recused myself in this case.

No. 5354.

J. WALLIS VS. THE NEW ORLEANS AND CARROLLTON RAILROAD COMPANY.

A party can not be held in damages for allegations set up by him in his pleadings in a suit, which assail the character of the other party, when it appears that the circumstances were such that he might reasonably have believed that the allegations were true.

A PPEAL from the Superior District Court, parish of Orleans. *Haikins, J.* Jury trial. *R. King Cutler* and *A. J. Steele*, for plaintiff and appellee. *L. E. Simonds*, for defendants.

The opinion of the court was delivered by DE BLANC, J.

Plaintiff was one of three drivers of car No. 52, belonging to defendant. He was discharged as such in October, 1872, and on the fourteenth of said month brought suit in the Seventh Justice's Court for the wages then due him. In the answer to said suit the company alleged that plaintiff had violated his duty, in collecting fares and appropriating them to himself. That answer was filed, but was not read in said court.

The case was tried, and decided against defendant. It appealed from that decision to the Third District Court, and in the last-mentioned court, and for the first time since it had been filed, the answer already referred to was read, in presence—the plaintiff says—of from seventy to one hundred persons, many of whom were his friends.

On the twenty-seventh of November, 1872, the justice's decree was affirmed by the Third District Court, and nearly one year after, on the fifteenth of September, 1873, Joseph Wallis brought suit against defendant for five thousand dollars, on the ground that, without probable cause, it had published or caused to be published, in two courts and elsewhere, what plaintiff terms a false and malicious charge.

This case was tried by a jury, and they returned against defendant a

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verdict for one thousand dollars. From the judgment based on that verdict the company has appealed. It contends that said verdict and judgment are contrary to law, as there was no proof that those who represent it ever entertained any malice toward plaintiff, and none can be inferred from any of their acts.

Plaintiff testified in substance that "he knows—he did not say how—he was injured and could not get employment in consequence of the charge thus made against him. He heard—he does not say from whom—that said charge was communicated to the other railroad companies. He applied, but in vain, to them and to several parties. No one told him he was a thief, but merely that they did not want to employ him."

In his cross-examination he said: "I am out of employment about three days (meaning, we presume, since about three days); I was, after my discharge, engaged during five months as a carriage driver, and as a stage driver during one month and a half. I did not take a nickel belonging to the company; no witness swore that I did. Kinly, on whose report I was discharged, declared in court that I am not the man who received and appropriated the fare. The slander was not circulated generally, but only to railroad companies."

H. A. Harding, a witness of plaintiff, testified that "he knows him; that he is an honest man; and that the accusation made against him has been circulated throughout the city, among the owners of hacks and carriages." How he learned that; whether directly from these persons, or otherwise; what influence and effect the report had or may have had; whether it was believed, and injured plaintiff, or disbelieved and denied, he does not say.

Plaintiff alleges that the charge made against him has prevented him from obtaining a position; he did not prove either by his own declaration, or that of others, how long he was without employment. From his own lips we have the acknowledgment that, after his discharge, he was—during more than six months—engaged as a driver, and the most of the time in this city, at the very spot where, as he pretends, he could find no employment on account of the slanders published and circulated against him.

If railroad officers and owners of hacks and carriages were warned against him; if that warning was the cause that he could not procure a position, why is it that these officers and owners were not summoned? They might have sworn to the verity of the facts alleged by him, while he and the only witness who appeared in his behalf testified as to mere impressions, contradicted by his own declaration on the trial, that "he was about three days out of employment."

When and where—for the first—and, so far as we can ascertain, for

the last time—was the denounced charge published against him? In the Third District Court, in November, 1872; not before, not elsewhere. He was then surrounded by strangers, who, perhaps, did not know his name, and by friends who, no doubt, were favorably disposed toward him. They heard the alleged slander; they heard its contradiction; and that slander fell harmless at their feet, a few moments after it was published.

As long as he does not expose it, a man's character is sacred, and he who assails it without cause should suffer; but a court can not look either out or beyond the record, and when, in that record, it finds but vague and unsupported opinions, testified to by an interested party and a friend of that party, a court can not justly punish. Were we to decide on impressions, might we not pause and inquire how it occurred that the date of the imagined wrong and that of his action for redress are so distant from one another?

As to any express or implied malice on the part of defendant toward plaintiff, when and where was it shown? In this great and impoverished city, where so many are daily seeking employment, the company selected plaintiff out of the many, gave him a position which, to be accepted, had but to be tendered, never addressed him a word of reproach, and only discharged him on the imparted information that he had been unfaithful and had violated his duty. Is there any company or any agent who would have acted otherwise?

Who informed against plaintiff? Was it a rival, an enemy, an applicant for the position he held? It was not, for that position was vacated and he did not take it. The fact that he was called as a witness and swore, as declared by plaintiff, that he was not the driver who received and retained the fare, shows that he was not prejudiced against him, but does not offset the legal effect of his previous declaration, when—without promise of reward, without hostility toward plaintiff—he pointed him out to defendant's agent and told him: "There is the man who took the nickel."

The cases referred to by plaintiff's counsel and reported in the sixth and eleventh Annuals are different from that presented to this court. In the first, the captain of a vessel was accused of having stolen and attempted to sell freight intrusted to his care. This accusation was unwarranted, had not even a pretext to stand upon. In the other case, a newspaper reporter had not merely alluded, as was his right, to plaintiff's arrest and the circumstances of that arrest, but had assumed and asserted his guilt, and accused him of other crimes, without the least foundation or excuse.

The doctrine which should govern the court in such controversies is as simple as sound. Was there a probable cause to justify the charge?

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Was the charge made under the honest and reasonable belief that it was true? If so, no damages can be recovered. Applying that doctrine to this case, we can not maintain the verdict of the jury, for it is evident that the company acted upon an honest and reasonable belief, and not through that wanton and wicked disposition, grossly negligent of the rights, reputation, and feelings of others.

It is therefore ordered, adjudged, and decreed that the verdict of the jury be and is hereby set aside, the judgment thereon based annulled, avoided, and reversed, and that there be judgment in favor of defendant; the costs of both courts to be paid by plaintiff and appellee.

No. 5332.

NELSON McSTEAD VS. ROTCHFORD, BROWN & CO.

In a suit brought to revive a judgment no plea will be entertained, and no evidence considered, which assails the validity of the judgment sought to be revived.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J. T. Gilmore & Sons*, for plaintiff and appellant. *T. S. McCay and G. A. Breaur*, for defendants.

The opinion of the court was delivered by MANNING, C. J.

The plaintiff seeks to revive a judgment rendered in his favor in 1864 against the defendants, and they resist the revival upon the ground that the original judgment is null for want of proper citation.

Prior to the passage of the act of 1853 judgments were imprescriptible. They never died. That act imparted to them the quality of mortality, and *eo instante* prescribed the mode of averting extinction—"provided, however," the act reads, "that any party interested in any judgment may have the same revived at any time before it is prescribed by having a citation issued according to law to the defendant or his representative from the court which rendered the judgment, * * * * upon whom the citation shall be served, unless the defendant or his representative shows good cause why the judgment should not be revived." Revised Statutes of 1870, sec. 2813.

Without that act no petition to revive was necessary. The judgment existed, subject to attack at the times and for the defects specified in the laws pertaining to that subject. The act did not profess to provide, nor was it intended to provide, a new mode of attack, because of alleged nullities. Its title is "an act relative to the prescription of judgments." Acts 1853, p. 250. Its purpose was to assign a limit to the duration of judgments, and to provide for the prolongation of their existence on condition of certain proceedings being taken. It was not intended to

establish a new mode of revising, setting aside, or reversing judgments. Article 556 of the Code of Practice had designated the four modes by which this was to be done.

It has been held that the act of 1853 is not a statute authorizing a proceeding to annul a judgment on the ground that it was rendered on insufficient evidence. *Drogre vs. Moreau*, 28 An. 173. In that case the defendant urged that the petition for revival is insufficient because it does not mention the parish of her domicile, nor allege that the indebtedness upon which was based the original judgment inured to her benefit, she being a married woman, and because it does not contain a prayer that she be authorized to stand in judgment. After remarking that these objections, if of any weight, should have been urged before the joinder of issue, the court say: "We do not think, however, that averments of that kind are essential on a simple application to revive a judgment. The law simply provides the mode of interrupting the prescription of a judgment. It does not require the production of the same evidence upon which the judgment was originally obtained."

In *Carondelet Navigation Company vs. St. Romes*, *idem* 437, the application for revival was resisted on the ground of insufficient process, not that the process in the suit for revival, but the process in the original suit, was insufficient. The averment was that the defendant "was not legally cited, and that she never signed, nor authorized any one to sign for her, the obligation sued upon," and upon which the original judgment was based. The court rejected the plea, saying "the object of this proceeding is merely to keep in force the judgment rendered heretofore by interrupting prescription." The defense in the case at bar is of the same character, and must be disposed of in the same manner.

The sole purpose of the act under review is to provide for the extinction of judgments by lapse of time, and to enable parties holding them to avert this consequence by proceeding in the manner prescribed in it. The prescription of conventional mortgages is averted by their reinscription. The prescription of judgments must be averted by a suit for revival with service of citation. The judgment of revival rendered in such suit does not cure any defect in the original judgment. It does not validate a judgment which was or is subject to attack because rendered on insufficient evidence or insufficient process, nor does it affirm or ratify the original judgment. It can not be pleaded in bar of an action of nullity for any defect in the original judgment. Unquestionably the plea of payment could be heard in this action, because that, like the plea of prescription, if successfully maintained, would show that the judgment is extinct. Perhaps a total and entire absence of citation upon any one might be pleaded, if we can suppose a judgment to have been rendered without any process whatever, but a defense, the object

McStee vs. Rotchford, Brown & Co.

of which is to impugn the validity of the original judgment, can not be heard in this proceeding, which is taken solely because of the statutory declaration that unless it is taken the judgment will expire.

The testimony of plaintiff on the trial of this suit shows that the original judgment is entitled to a credit.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court is avoided and reversed, and that the judgment of plaintiff against defendants, described in the pleadings as having been rendered by the Second District Court of New Orleans on tenth of February, 1864, and signed on seventeenth of same month and year, is hereby revived, subject to the credit of four thousand three hundred and sixty-eight dollars on the twenty-third of December, 1862, and that the defendants pay costs in both courts.

No. 6477.

STOUGHTON COOLEY vs. H. H. BROAD ET AL.

29	71
50	646
29	71
1123	341

When the record of appeal contains no note of the evidence offered and received in the court below; and no statement of facts agreed on by the parties, or made by the inferior judge; and no bill of exception, or assignment of error, the appeal will be dismissed. And the usual certificate of the clerk of the lower court, that such a record contains a copy of all the evidence, etc., offered and filed in the lower court, is not sufficient to maintain the appeal.

A PPEAL from the Fifth District Court, parish of Orleans. *Cullom, J. Hornor & Benedict*, for plaintiff and appellee. *F. D. King*, for appellant.

The opinion of the court was delivered by SPENCER, J.

Plaintiff moves to dismiss this appeal of defendants, on the following grounds:

First—That the record does not contain any written note of the evidence offered and received on the trial.

Second—That it does not contain any statement of the facts agreed upon by the parties, or made by the judge.

Third—That it does not contain any bill of exceptions, or assignment of errors.

“The Supreme Court can only exercise its jurisdiction in so far as it shall have knowledge of the matters argued or contested below.” C. P. 895.

The Code of Practice has provided carefully for all the phases which a trial below may assume, and has provided the means of bringing to the notice of this court all questions of law and fact in appealable cases.

Article 601 provides that “either party may require the clerk to take

down the testimony in writing, which shall serve as a statement of facts, if the parties should not agree to one."

Article 602 provides: "When the depositions of witnesses have not been taken in writing in the inferior court, the party intending to appeal, or his advocate, must require the adverse party, or his advocate, to draw up, jointly with him, a statement of the facts proved in the cause, and this statement thus drawn up and signed, either by the parties or their advocates, shall be annexed to the record or transcript of the same transmitted to the Supreme Court."

Article 603: "If the adverse party, when required to do so, refuse to join in making out the statement of facts, or if the parties can not agree as to the manner of drawing the same, the courts, at the request of either, shall make such statement, according to their recollection of the facts, or from the notes they have taken of the evidence."

Article 896: "If, therefore, the copy of the record brought up be not duly certified by the clerk of the lower court, as containing all the testimony adduced, the Supreme Court can only judge of such cause on a statement of facts, prepared and signed in the manner directed above, or on a written exception to the opinion of the judge, or on a special verdict, and in the absence of all these, it shall reject the appeal with costs; but this is to be understood with such modifications as are contained in the following articles."

Article 897: "The appellant who does not rely, wholly or in part on a statement of facts, an exception to the judge's opinion, or special verdict to sustain his appeal, but on an error of law appearing on the face of the record, shall be allowed to allege such error, if within ten days after the record is brought up he files in the Supreme Court a written paper, stating specially such errors as he alleges; otherwise his appeal shall be rejected."

The record in the case at bar has the usual certificate of the clerk appended to it, in which he certifies "that the foregoing fifty-six pages contain a true copy and transcript of all the documents filed, proceedings had, and evidence adduced, etc."

If the motion in this case to dismiss rested upon the insufficiency of the clerk's certificate, it certainly could not prevail. That certificate certifies that the transcript is complete; that all the pleadings, proceedings, and evidence are contained in it. But when we open the record to examine it, as we are bound to do under that certificate, we find nothing which "gives us knowledge of the matters argued or contested below." We find therein certain pleadings and copies of contracts, notes, protests, notices of protest, and other papers. But we find no note or memorandum showing which, if any, of these various documents were offered as evidence on the trial below, or received or considered by the

court. We find no "statement of the facts proved in the cause," made either by the parties, their advocates, or the judge. We find no special verdict, bill of exceptions, or assignment of errors. How can this court undertake to decide whether the judge *a quo* made a wrong judgment or not unless it have before it a statement, in some form, of the facts proven or considered by him? Are we to presume that all the documents, etc., appearing in the record were offered in evidence, and received and considered by the court? Every lawyer knows that records are largely filled up with papers which are not offered; or if offered, not received in evidence. Every paper annexed to a plaintiff's petition, or defendant's answer, is necessarily copied into the record, but this is no proof that such paper was either offered or received in evidence.

The clerk's certificate that a record contains "all the evidence adduced" in a cause, even if literally true, would not enable this court to review the judgment of the lower court, in the absence of a note of evidence, or statement of facts, or some memorandum in writing as to what was submitted to the judgment of the court, for while it might be true that the record contained "all the evidence adduced," it might be equally true that it contains many papers and documents which were either not offered, or being offered were not received in evidence. Such a certificate by the clerk does not enable this court to know the precise facts upon which the lower court acted, and without such knowledge this court can not proceed. It is clear, therefore, that such a certificate can not supply the place of a note of evidence or statement of facts.

Under our law it is well settled that the clerk can only certify copies of his records, and that his certificate of any fact, not appearing by the record, is of no avail. He can not certify that a plaintiff's petition contains certain allegations, but he can certify a copy of that petition. As to what it contains, the petition must speak for itself. So a clerk's certificate that a record contains "all the evidence adduced" is ineffective, if that record *does not of itself show* what evidence was adduced. In our opinion the clerk *can not* "duly certify" a record "as containing all the evidence adduced" as contemplated by article 896 of the Code of Practice, unless there is in that record some proper note or memorandum of the evidence offered and received. If there is such note in the record, then the clerk may well certify that the record contains copies of the instruments of evidence named in it. To hold otherwise would, it seems to us, put litigants at the mercy of the memory of clerks, and abandon all certainty in judicial proceedings. These certificates which clerks append to transcripts are most frequently written weeks, often months, after the case is tried. Now, there being no note, or memorandum, of the evidence offered and received, to be found in the record, does not the clerk, of necessity, when he certifies that record as containing

"all the evidence adduced," do so from mere memory? Suppose witnesses to have testified orally in court, and that their testimony was not reduced to writing, might not the clerk, after the lapse of weeks or months, forget this, and innocently certify the record as containing "all the evidence adduced." But if there is in the record, as part of it, a writing made at the time of trial and under the supervision of the parties and the court, showing what evidence was offered, then the clerk certifies what the record shows of itself. If the testimony has not been noted in writing, its place can only be supplied by a statement of facts made by the parties or the judge. The clerk has no power, either directly, or by his certificate, to supply this statement.

We therefore conclude, that as an examination of the record in this case does not give us "knowledge of the matters argued or contested below," and does not put us in possession of the facts upon which the judge *a quo* based his decree, we are obliged to dismiss this appeal.

It is therefore ordered that this appeal be dismissed at the cost of appellants.

CONCURRING OPINION.

MANNING, C. J. I concur in the judgment dismissing the appeal.

The certificate of the clerk is in the usual form; *i. e.*, that the foregoing pages contain a true and complete transcript of all the proceedings had, evidence adduced, and all the documents filed upon the trial of the case. In the absence of any allegation impeaching its truth the certificate is conclusive—*pro veritate accipitur*. Neither party questions its truth. There is no suggestion of diminution of the record, nor application for a writ of *certiorari*.

In *Reeves vs. Adams*, 5 La. 288, it was said, the Supreme Court will consider the entire case, and decide on its merits, if either the clerk or judge *a quo* certifies that the record contains all the documents and evidence on which the cause has been heard and determined.

In *Erwin vs. Orillion*, 6 La. 205, this doctrine was repeated, the form of the dictum there being, that the certificate of the clerk alone that the record contains a copy of all the documents on file, a transcript of all the proceedings had, and all the testimony adduced, authorizes the Supreme Court to examine a case on the merits. See, also, *Cammack vs. Gordon*, 20 An. 213, and *Louisiana State Bank vs. Cammack*, 21 An. 133.

I recognize the correctness and binding force of these decisions, and am prepared to examine this case on its merits. But when I turn to the record, I find no note of the evidence that was offered. There is a mass of documents copied in the transcript, but nothing to indicate that they are a part of the testimony. The appellate court will not notice documents that are copied in the transcript, if not referred to and indicated

Cooley vs. Broad.

in the note of evidence, although they may be annexed to the answer. *McAuliffe vs. Destiehan*, 9 Rob. 466.

It is the duty of the appellant to see that the record contains all the evidence on which the case was tried. *Magloire vs. Barbin*, 25 An. 687. And it is not the duty of the clerk to take it in writing, unless required by one of the parties to the suit. C. P., art. 601; *Bowman vs. Janes*, 6 La. 124. There is no statement of facts, which can alone supply the want of the evidence as received, nor is there any assignment of errors, nor bill of exceptions. There is nothing which can inform the court of the merits. We can not reverse the decision of the lower court, as the appellant desires, because the record filed by him does not afford us any means of ascertaining that it is wrong. We can not affirm it, though the legal presumption is in favor of its correctness. When there is no note of evidence in the record of appeal, it will be presumed that the judgment of the court *a qua* was properly rendered, and upon evidence properly before it. *Graham vs. Rice*, 23 An. 393; *Simmons vs. Howard*, *idem* 504; *Smith vs. New Orleans*, 24 An. 20.

The party who desires to have a judgment, of which he complains, reversed, should have the testimony reduced to writing, or a statement of facts made; otherwise the presumption is that appellees fully made out their case below. *Johnson vs. Spearing*, 15 La. 232.

Dismissal of the appeal is the only action the court can take, and it has been already so adjudged. In every appeal the evidence on which the judge acted must be brought up, or the appeal will be dismissed. *Jones vs. Neville*, 9 Rob. 478.

No. 5292.

MRS. M. W. GRAHAM VS. MRS. Z. A. THAYER.

Where a note is executed by a married woman authorized by her husband for property bought by her, during marriage, and it is not shown that she is separate in property, nor that she administered her paraphernal property, nor that she was a public merchant, nor that the property inured to her separate benefit, she can not be held liable on the note. Such a note is a debt of the community, inasmuch as the property, the consideration of the note, belongs to the community. For such a debt, a wife, such as is sued herein, is incapable of binding herself. The husband alone is liable.

A PPEAL from the Fifth District Court, parish of Orleans. *Cullom, J.* *Hunton & Grover*, for plaintiff and appellee. *H. D. Oyden*, for defendant.

The opinion of the court was delivered by MARR, J.

This is a suit against a married woman on a promissory note made by

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her to her own order, and by her indorsed in blank, with the authorization of her husband.

Defendant, after pleading the general denial, answered that the note sued on, and a similar note, were given for real property purchased by her from plaintiff. That finding she could not meet the notes, she consented to abandon the property in full payment; that the property was sold with her consent; that she received no part of the price; that the proceeds were applied to the payment of the two notes, and that this arrangement, as she believed and intended, was in full satisfaction and payment of the whole indebtedness.

Defendant was not present and was not represented at the trial in the court below, and no evidence was offered except the note itself. There was judgment in favor of plaintiff, and the case is before us on the appeal taken by defendant.

The note shows on its face that it was made and indorsed by a married woman, and it is not alleged in the petition, nor does it otherwise appear, that she was separate in property, nor that she administered her paraphernal property, nor that she was a public merchant, nor that the consideration for which the note was given inured to her separate advantage.

The law presumes a community of acquests and gains in every marriage. C. C. 2399 (2369.) Whatever may be purchased during the marriage by husband and wife, or by either, falls into this community or conjugal partnership, except where the separate means of one of the spouses are used with the intention to make a separate acquisition. C. C. 2402 (2371); *Dominguez vs. Lee*, 17 La. 296.

The debts contracted during the marriage also enter into the community, except such as are contracted for the separate benefit of one of the spouses. C. C. 2403 (2372). The debts of the community must be paid by the husband, the head and master of the conjugal partnership. C. C. 2404 (2373). And the wife is forbidden to bind herself for the debts of her husband or of the community. C. C. 2398 (2412).

In general, where property is purchased during the marriage, the fact that it is conveyed to the wife does not create even a presumption in her favor. The property belongs to the community, and she is not bound for the price. *Davidson vs. Stuart*, 10 La. 148; *Beatie vs. Walker*, 1 Rob. 431; *Smalley vs. Lawrence*, 9 Rob. 211.

Property purchased by the wife is presumed to belong to the community, and to be liable for its debts unless the contrary be shown. *Webb vs. Peet*, 7 An. 92; *Clarke vs. Norwood*, 12 An. Debts contracted during the marriage are presumed to be debts of the community, and the wife will not be bound unless it be proven that the consideration inured to her separate benefit. *Thomson vs. Chick*, 19 An. 206; *Surls vs. Hima*, 20 An. 229.

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No proof would be admissible under the allegations of the petition in this case which would charge the wife with liability. The fact that she purchased the property for which the note was given does not create a presumption that she was the owner, nor rebut the legal presumption that it was an acquisition of the community, for which she is not permitted by law to bind herself.

The judgment of the court below is clearly erroneous, and it would be useless to remand the case, since there are no allegations in the petition under which proof of liability could be made. We will not conclude the appellee, however, but will afford her the opportunity to establish the liability of the defendant, appellant, if she can do so, in another suit.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed, and that there be judgment of non-suit against plaintiff, appellee, with costs in both courts.

No. 8405.

29	77
44	219
44	232
44	240
44	705
44	713

STATE OF LOUISIANA EX REL. T. J. DURANT VS. THE BOARD OF LIQUIDATORS.

The act of the Legislature No. 81 of the year 1872, which abolished the free-school fund, and which ordered the bonds composing that fund to be sold by the Auditor and Treasurer of the State, is unconstitutional, and no property in any of those bonds has been acquired by any purchaser of the bonds, who may have bought them at a sale made under said act No. 81.

A PPEAL from the Superior District Court, parish of Orleans. *Lynch, J. Hornor & Benedict*, for relator and appellant. *H. C. Dibble*, Acting Attorney General, for appellee.

The opinion of the court was delivered by SPENCER, J.

Relator alleges that he is the owner of three "free-school- und bonds," issued under act (No. 182) of the nineteenth of March, 1857, and of twelve coupons due thereon: that he acquired said bonds by purchase from the State, at a sale thereof made by the Auditor and Treasurer under section six of act No. 81 of 1872, and paid for them with a three-thousand-dollar "certificate of indebtedness," issued to him for professional services; and duly registered as provided in said act; that on the twenty-fourth of January, 1874, the funding act was passed, providing for the funding of the outstanding obligations of the State; that said three bonds and coupons are part of the obligations of the State fundable under said act; that the said bonds are of the class designated as doubtful by the supplemental funding bill, act No. 11 of 1875, page 110; that the Board of Liquidation refuses to fund them; wherefore he prays for a mandamus, which was directed to issue nisi.

The Funding Board, as cause why said bonds should not be funded for, answer:

First—Generally deny relator's allegations.

Second—Say the bonds sued upon are not valid obligations of the State in the hands of relator; that the act No. 81 of 1872 is, so far as it authorized the re-issuance of the said bonds, void.

Third—That the State received no valid or sufficient consideration for said bonds, and that the relator is the first holder from the State with full notice.

Upon these issues the case was tried. The court discharged the rule and refused the mandamus, and the relator prosecutes this appeal.

The testimony shows that the relator purchased these bonds at the sale of the "free-school-fund" bonds, made by the Auditor and Treasurer under section six of act No. 81 of 1872, and paid for them by a "certificate of indebtedness" for three thousand dollars, issued for professional services rendered the State at Washington, and duly registered according to the first section of said act.

The counsel for the board insist in their brief that this suit is premature, since the supplemental funding act declares that the board shall not fund these bonds until a final decree of the Supreme Court has established their validity and legality; that this decree of the Supreme Court is a condition precedent to the relator's right to proceed by mandamus; that the relator should have first brought a regular suit against the board and established the validity of his bonds, and then have proceeded by mandamus if the board refused to fund them.

Had this objection been pleaded *in limine* there might have been more force in it. But the defendants chose to go to trial on an answer which put the validity and fundability of the bonds in relator's hands at issue. The court must try the issues presented, whether in the petition or answer. The law abhors litigation and multiplicity of actions. As an original proposition we see no good reason why the question of validity of the bonds should not be cumulated with a proceeding for mandamus. It would at least save costs, diminish litigation, and hasten results.

But there is a more serious defense interposed to relator's demands. The board alleges that the act No. 81 of 1872, directing the sale of the free-school bonds is void, as violative of the act of Congress of the fifteenth of February, 1843, and of article 139 of the constitution of the State. The act of Congress above referred to provides (see act of February 15, 1843, 5 Stat. at Large, page 600):

"That the Legislatures of Louisiana and certain other States be, and they are hereby, authorized to provide by law for the sale and conveyance in fee simple of all or any part of the lands heretofore reserved and appropriated by Congress for the use of schools within said States, and to invest the money arising from the sale thereof in some *productive fund*, the proceeds of which shall be forever applied, under the

direction of said Legislatures, to the use and support of schools within the several townships and districts of country for which they were originally reserved and set apart, and for no other use or purpose whatever; provided said land or any part thereof shall in no wise be sold without the consent of the inhabitants of such township or district, to be obtained in such manner as the Legislatures of said States shall by law direct; and in the apportionment of the proceeds of said fund, each township and district shall be entitled to such part thereof, and no more, as shall have accrued from the sum or sums of money arising from the sale of the school lands belonging to such township or district."

Section two authorizes Legislatures to protect school lands from waste and for leasing them when deemed inexpedient to sell.

Section three provides that "in case the proceeds accruing to any township or district from said fund shall be insufficient for the support of schools therein, the Legislature is to invest the same in *the most secure and productive manner*, until the fund becomes adequate to the permanent maintenance and support of schools within the same," etc.

The Legislature, by act No. 321 of 1855, created the "free-school fund," and declared that the same "shall be held by the State as a loan, and shall be and remain a perpetual fund to be called the 'free-school fund.'" The act by its thirty-second, thirty-third, and thirty-fourth sections provides for the sale of sixteenth school sections, and for paying the proceeds into the treasury, and for paying thereon to the townships six per cent interest according to the act of Congress. Section thirty-six provides that "all moneys received or to be received as proceeds of sales of sixteenth sections and the interest thereon shall be placed to the credit of the townships and the interest be paid out as the people thereof direct."

The act of the Legislature No. 182 of 1857 further provided by its first and second sections for the ascertainment of the debt due by the State to the free-school fund, and directs the issue of bonds of the State therefor by the Governor, payable in forty years, and bearing six per cent interest, payable semi-annually, said bonds to be of the denomination of one thousand dollars. The fourth section pledges certain other bonds and the interest to accumulate thereon as a special trust fund for redemption of these school-fund bonds. Section eight declares that the assets of this free-school fund "shall be a perpetual fund in trust, never to be diverted to any other purpose than that for which it was and is pledged. The interest accruing on said bonds shall *first* be applied to the payment of the annual interest due to the various townships in the State, to be ascertained as provided in section nine of this act. The balance of the interest collected shall be placed in the current school fund and applied to current school expenses." Section nine provides for ascertaining the amount due the several townships, and the mode of

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calculating and paying the interest thereon. Section twelve provides that all the bonds belonging to the "free-school fund," or which may hereafter belong to it, shall be delivered to the Secretary of State and State Treasurer, and be by them held *in joint custody*, and by them delivered to their successors, who shall execute duplicate receipts therefor, one of which shall be delivered to the Governor and filed in the executive office.

The constitution of 1868, article 139, provides that the assets of this "free-school fund [following almost exactly the language of the act of 1855 (No. 321) creating the fund] shall be held by the State as a loan, and shall be and remain a perpetual fund, on which the State shall pay an annual interest of six per cent, which interest * * * shall be applied to the support of public schools, and this appropriation shall remain inviolate."

Does the act No. 81 of 1872 violate this provision of the constitution and the provisions of the act of Congress of the fifteenth of February, 1843, as carried into effect by acts Nos. 321 of 1855 and 192 of 1857, of the Legislature?

The relator contends that there is no force in the objection raised under article 139 of the constitution, that that article in no way forbids the sale of the particular bonds mentioned in act No. 81 of 1872. That article must be construed with reference to the act of Congress and previous acts of the Legislature above referred to. The act of Congress directs the Legislature to invest the proceeds of these school lands in some "productive fund, the proceeds of which shall be forever applied, under the direction of the Legislature, to the use and support of schools and for no other purpose."

The act of the Legislature of 1855 organized the free-school fund and provided for the sale of the school lands and the payment of the proceeds into the treasury, and declared it "shall be and remain a perpetual fund to be called the free-school fund."

The act of 1857 provided for the ascertainment of the amount due by the State to this fund, and directed the issue of State bonds therefor by the Governor, payable in forty years, with six per cent interest, payable semi-annually. The fourth section pledges certain bonds for the redemption of these free-school bonds, and the eighth section declares that the assets of this free-school fund "shall be a perpetual fund in trust, never to be diverted to any other purpose," and "that the interest on these bonds shall first be applied to the payment of the annual interest due to the various townships in the State." Finally, section twelve provides special depositaries for these bonds, to wit: the Secretary of State and the Treasurer, who are to hold them "in joint custody." Now, the constitution repeating, in almost the identical words, the act of 1855, creat-

ing this "free-school fund," provides that the assets composing said fund "shall be held by the State as a loan, and shall be and remain a perpetual fund * * * the interest of which shall be applied to the support of public schools, and this appropriation shall be inviolate."

Does the act No. 81 of 1872 violate this act of Congress and the constitution of the State? The act of Congress directs an investment in some "productive fund." The Legislatures of 1855 and 1857 carried into effect the act of Congress by creating and organizing the free-school fund. The constitution in substance says this fund "*shall be and remain a perpetual fund.*" The act 81 of 1872 by its third section "abolishes" this free-school fund, and transfers its assets to a special fund created by it for "redemption of the floating debt." By its sixth section it directs the Auditor and Treasurer (the Secretary of State and Treasurer being the lawful joint custodians) to sell the bonds belonging to this fund to the highest bidder for currency or State warrants or certificates of indebtedness.

In our opinion this act 81 of 1872 not only violates the act of Congress and the legislation thereunder and the constitution, but was an act of spoliation, intended and designed to deplete the treasury of every available asset or fund in it. These school bonds were supposed to be more salable than Auditor's warrants and certificates of indebtedness with which the State had been deluged; hence some device to get hold of them had to be concocted, and act 81 was the result. Some of these bonds were, it appears, not even negotiable; hence act 81 provides and directs that in such case the Auditor should indorse them with words to the effect that they were hereafter payable to bearer.

The interest of these school-fund bonds was pledged for the payment of the interest annually due to the several townships for school lands sold. The third section of act 81, directing the Auditor to annually estimate what would have been due to the free-school fund, if the same had not been abolished, and to levy and collect a tax to pay interest thereon, is not a compliance with the act of Congress, nor does it relieve the measure of the character we have already given it. We regard act 81 as violating the faith and solemn pledges of the State, that the State *quoad* those bonds was and is a mere trustee, and that the acts of Congress and the legislative action thereunder created obligations on the part of the State, in favor of the inhabitants of the various townships and other beneficiaries, which the State is not at liberty "to abolish" at its pleasure.

We therefore regard the sale of these "free-school bonds" held by the relator to be null and void, and that he acquired no title to them by virtue of the pretended sale under section six of said act 81.

The judgment of the lower court discharging the rule *nisi*, and refusing the mandamus is affirmed, with costs in both courts.

No. 5314.

A. ROCHEREAU ET AL. VS. WILLIAM McC. JONES ET AL.

The illegal cancellation of an official bond will not release the sureties on the bond, from their liability for any official delinquency of their principal.

The sureties on the official bond of a notary public are liable for any loss, or damage caused by his affixing his notarial paraph to any mortgage note which he knew to be forged. And any one injured by his act, has a right of action on the bond against his sureties.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J. C. E. Schmidt*, for plaintiffs and appellees. *William Grant*, for defendants.

The opinion of the court was delivered by DEBLANC, J.

One of the defendants, William McC. Jones, was, in 1869, a notary public of the parish of Orleans. As such he gave two bonds, one on the twenty-eighth of July, 1869, the other on the fifteenth of August, 1870. The condition of each of said bonds is "that said Jones shall well and faithfully discharge and perform all the duties incumbent upon him as a notary public, in accordance with the laws of the State." In substance, the aforesaid condition is that fixed by an act of the Legislature approved on the twelfth of March, 1857, and which provides "that the notaries appointed for the parish of Orleans shall give bond in the sum of five thousand dollars, subscribed in favor of the Governor of the State, and conditioned as the law directs, for the faithful performance of their duties."

The other defendants are Edward H. Wilson and the legal representatives of Samuel S. Green, the sureties on the bond furnished by Jones in 1869.

The plaintiffs have brought suit against said defendants for \$1241 31, with five per cent interest thereon from the thirty-first of December, 1872, for this: They allege that on the thirtieth of December, 1871, one August Hoffman, by act passed before said Jones as a notary, sold to the Union Band Association No. 1, for twenty-six hundred dollars, the property described in said act. One third of the price was paid in cash; for the balance the association, through its president, furnished two notes of each \$866 66 $\frac{2}{3}$, drawn and indorsed by said association. These notes were delivered to the vendor, and were in his possession on the day of the trial of this case.

Between the thirtieth of December, 1871, when these notes were furnished by the Union Band Association, and the third of May, 1872, Jones forged two notes exactly similar to those drawn by said association in favor of Hoffman, and attached to those forgeries, in red ink, the following certificate, to wit: *Ne varietur, secured by mortgage by act passed before me and stamped three dollars. New Orleans, December 30,*

29	88
44	37

29	82
117	445

Rochereau vs. Jones.

1871. That certificate is signed *William McC. Jones, notary public*. On the first of May, 1872, representing these notes as those which had been subscribed by the association, and which were secured by the vendor's mortgage and privilege, he offered to sell them to plaintiffs, aware as he was that they were in the habit of investing in mortgage paper. Plaintiffs' attorney was instructed to examine the act of sale with which those notes were identified and the title to the property sold. This he did, and the report being favorable, plaintiffs purchased the notes for \$1707 28, paid to said Jones on the third of May, 1872.

At the maturity of the first of said notes, with a view of concealing his fraud and his crime, Jones paid on account of the same the sum of \$422 40, and by misrepresentation obtained a delay for the payment of the balance. The extended delay expired, and plaintiff sued out executory process to enforce payment of the balance due to their firm on the discounted notes, and ascertained then that they held but mere forgeries, which they were induced to buy because they appeared to be secured by the vendor's mortgage and privilege, a fact certified to by said notary's signature, which was known to plaintiffs.

Defendants aver that said plaintiffs have no cause of action; that the bond given by Jones and signed by them in 1869 was canceled before the act of malfeasance charged against said Jones, by virtue of an order from C. C. Antoine, then acting as Governor, on the fifteenth of September, 1873, six days after plaintiffs had filed their suits against defendants, and notwithstanding plaintiffs' protest against the canceling of said bond, filed in the office of the Secretary of State within the delay prescribed by law. They further contend in their defense that, if the bond of 1869 was not annulled by the aforesaid order, it was superseded by the bond executed in 1870 by said Jones and other sureties, and they relieved from all liability.

In May, 1872, when Jones discounted and transferred the notes he had forged, the bond of 1869 was not and could not have been legally canceled, and no subsequent cancellation of that bond could impair or destroy a right previously acquired. At and after the date of the forgery, and at and after the date of his fraudulent transfer to plaintiffs, Jones was a notary public of the parish of Orleans. There is an admission that he was suspended from the exercise of his functions as such on the twenty-fifth of August, 1873, but that suspension is not equivalent to the vacancy which happens by the resignation, death, or dismissal of an officer, or by the expiration of his term of office. It is only from the date of that vacancy that an application can be made to raise and annul the officer's bond, and only from that date that the Governor is authorized to order a publication of any such application. It is useless, then, to discuss the demerits of the course pursued in this instance by

Jones's sureties, the Secretary of State, and the acting Governor. They are fraught with the most patent and unjustifiable irregularity; a carelessness which has not an excuse, not a pretext to stand upon. V. R. S., section 359.

Was the bond of 1869 superseded by that of 1870, as contended by appellants? The reasons urged by their able counsel are insufficient, and we have looked in vain for any in our statutes and reports to support that pretension. Under the former legislation the term of office of a notary was fixed at four years, since then that term continues as long as he renews his bond within the delay prescribed by law, and that delay is of five years. Therefore Jones's bond of 1869 remained in force until at least the twenty-eighth of July, 1873, if we measure that bond by the term of the four years commission; otherwise, until the twenty-eighth of July, 1874, and it was in May, 1872, that he was guilty of the offense charged against him. V. R. S., sections 2505, 2506.

If, within the prescribed delay, officers were allowed to give several bonds instead of one, where the validity and sufficiency of that one are undisputed, what confusion might ensue. They might, with a considerable degree of impunity, fail in the discharge of their duties or violate their obligations, and as very often the dates of these omissions and commissions could not be ascertained or made to correspond with the dates of either the previous or ulterior bonds, the sureties of the offender could seldom be reached.

From the evidence on file in regard to said bonds we conclude that the sureties' right to apply for the canceling of that given in 1869 had not accrued; that under the circumstances the acting Governor was without authority to issue even a notice of their application; that the granting of said application was unwarranted in law, unwarranted by the facts; that if said notice had not been premature, the protest of plaintiffs was filed within the time and at the place indicated by law, and that from the date of that protest the Governor's duty was to refer the parties to a court of competent jurisdiction. He has not done so, and the bond of 1869 is neither canceled nor superseded. V. R. S., section 361.

The appellants have called our attention to a section of the Revised Statutes of 1876, which provides "that the notary's bond is for the faithful performance of all the duties required by law toward all persons who may employ him in his profession of notary," and that the letter of that section excludes plaintiffs from the list of those who can proceed on that bond, for the reason that they had not employed Jones, and he was not acting for them. The answer to that is that the act of 1857, the only one that applies to this case, fixes as the broad and legitimate condition of the notary's bond, that he shall faithfully perform his duties in that capacity.

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Has he complied with or has he violated that obligation? We fully concur in the proposition invoked by appellants' counsel "that he did not bind himself for Jones's good behavior as an individual." If, then, as a notary, from the twenty-eighth day of July, 1869, when he gave his bond, until the third of May, 1872, when he stole the price of his forgery, he has faithfully performed his duties as a notary of the parish of Orleans, appellants' defense must prevail.

In matters of sales on terms, when notes are furnished by the vendor, what is the duty imposed on the notary? He shall attest each of the notes by putting his name on them, mentioning the date of the act from which the mortgage and privilege are derived, under the penalty of damages. R. C. C., 3884. That attestation, the notary's name, his signature, those distinct and deceitful badges of simulated authenticity, are on the face of the discounted notes. The forgery is not that of an individual, but of the notary; his signature on those notes disguised and concealed the criminal fabrication, justified the conviction of their reality, left no room for suspicion and doubt, and was, as to the form and legal existence of those instruments, the principal, nay, the only cause which induced an acceptance of their transfer. Was not that forgery a violation of his official duty? If not, what would amount to or constitute such a violation?

Had he not attached his signature to the attestation and his official capacity to his signature, however guilty he would have been, his sureties on his bond would not have been responsible. Had he discounted or sold notes forged by another notary, or by any one else but himself, he alone would have been liable. But, can his sureties be released when the evidence establishes beyond contradiction that it was as a notary he forged the notes, as a notary that he forged the signature of the parties to the act, and that it was his signature as a notary that gave to those notes that form, that character, without which they could not have been converted into money? The attorneys representing appellants rely on decisions of this court reported in the sixth and sixteenth Annuals. Those decisions we adhere to. If interested parties deposit funds with a notary and he fails to account for those funds, his sureties are not liable; and why? Because, as his office is not one of deposit, he was trusted and received the deposit, not as an officer, but as an individual. The doctrine cited by Barge is to the same effect, that in Scotland the sureties of messengers and notaries, when the latter act in another and different capacity—for instance, the first as agents, the others as town clerks—are not liable for their errors and neglects in the last-mentioned capacity, and in support of that incontrovertible opinion he cites a maxim as ancient as legislation:

"Loequis se read caution pour quelqu'un, l'engagement ne va pas

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au-delà de la somme ou de la cause exprimée; on ne se rend pas non plus responsable des dommages qui peuvent naître d'une cause étrangère au cautionnement."

We find in Burge, page 49, "that the surety of a public officer is responsible only for those acts which are done by virtue, or under color, or by means of the office he holds." Jones's forgery, his fraud, was successful; and why? Because they were perpetrated under color and by means of the office he held. His capacity and his offense can not be asseverated.

High and important functions are intrusted to notaries; they are invested with grave and extensive duties; they are charged with the solemn preparation of the authentic evidence of our transactions, of last wills, of those titles which pass from one generation to another. Their responsibility is as high as their trust, and a notary who officially certifies as true what he knows to be false violates his duty, commits a crime, forfeits his bond, binds himself, and binds his sureties.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be and it is hereby affirmed at appellants' costs.

DISSENTING OPINION.

MARR, J. I am not able to concur in the opinion of the majority of the court just pronounced in this case.

I differ with my brethren on a single point only, and the range of inquiry is within very narrow limits, depending upon the meaning and effect of article 3364 (3347) of the Civil Code, which is as follows:

"Every notary before whom an act shall have been passed by which notes to order have been given for the payment of a debt bearing a privilege or mortgage, shall attest each of the notes by putting his name on them, mentioning the date of the act from which the privilege or mortgage is derived, under the penalty of damages."

An act of sale was passed before Jones, a notary, and two notes were given for the deferred payments of the price, bearing vendor's mortgage. It was the official duty of Jones to paraph these notes, and if he had failed to do so he would have been liable in damages. He did all with respect to these two notes that the law, that his official duty, required. He chose to do something more. After his entire official duty with respect to these two notes had been performed, he made two other notes, exactly the counterpart of the two real notes. He forged the signature of the maker and indorser. He paraphed these forgeries, just as he had paraphed the two real notes, and he sold these forged notes to Rochereau & Co.

Rochereau & Co. took these forged notes on the faith of the paraph of

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Jones, and when the forgery was discovered they sued Jones and the sureties on his official bond. The condition of the bond is that Jones shall "well and faithfully discharge and perform all the duties incumbent upon him as a notary public, in and for the parish of Orleans, in accordance with the laws of the State of Louisiana."

No complaint is made that Jones did not do all that the law and duty required of him touching the act and the two genuine notes, and when he forged two other notes, and put his paraph upon them, he was not doing any act required of him by law, he was not in the performance of any duty, he was simply committing a crime which the law forbids and punishes.

The act of 1857 requires notaries to give bond for "the faithful performance of their duties." R. S. of 1870, sec. 2521. Section 2508 of the Revised Statutes directs that the condition of the notary's bond shall be for "the faithful performance of all duties required by law toward all persons who may employ him in his profession of notary." The condition of the bond differs from that prescribed in this section, but the enactment is a correct exposition of the intention of the Legislature with respect to the liability of the sureties of the notary. They are answerable to those who employ the notary in his profession for his failure to perform his professional duty.

Rochereau & Co. did not employ Jones. The parties to the act of sale employed him, and he performed his entire duty to them. He committed a crime, and defrauded persons who had not employed him in his profession as notary, which his position as notary enabled him to do, and Rochereau & Co. were the victims. In all this criminal conduct he did not fail to perform his official duty toward any person who had employed him in his profession. He simply violated his duty as a citizen by committing a crime against the peace and dignity of the State.

Davis vs. Barham, 1 An. 528, it seems to me, does not authorize the interpretation which has been put upon it. Barham was sheriff of Morehouse parish. Davis had obtained a judgment against Hall, and an execution was issued upon that judgment, and was put into the hands of Barham, to be levied upon certain slaves, the property of Hall, and in his possession. Barham had ample time to levy on the slaves. Instead of doing this, which his official duty required, he sent word to Hall to get the slaves out of the way before a certain hour, or he would be at his house at that hour to make the levy. Hall took the slaves into the State of Arkansas, and when Barham arrived at his house with the writ the property was beyond his reach, as Barham intended and arranged beforehand. Failing to make his debt, Davis sued Barham and his sureties, and they were held liable.

The difference between that case and this is manifest. Barham, as

sheriff, had received the writ. He knew where the property was; it was within his reach. If, instead of sending a messenger to Hall warning him to remove his property, he had gone with the writ, he would have found and have levied on the slaves. It was a clear case of failure on his part to perform an official duty which it was perfectly in his power to have performed, and which he willfully and purposely failed to perform, simply because he did not choose and did not intend to perform it. He and his sureties were not held liable for a wrongful act not pertaining to his official duty, for doing something which the law prohibits and punishes as a crime, but for not doing what the law specially required him to do, which he simply refused to do, and which he placed it out of his power to do, when the performance was perfectly within his power.

The law does not require, nor does it authorize, the notary to paraph notes generally. It is not his business to paraph any and all notes. His duty and power in this respect are restricted to notes which are to be identified with acts passed before him, stipulating a privilege or mortgage. This means real, genuine notes, not forgeries, which are only the false semblance of notes. The law requires no official act of the notary touching forged notes, and all that Jones did with respect to these forgeries was entirely unofficial, a gross fraud and crime, for which his sureties, in my opinion, are not amenable.

I differ with the other members of the court with reluctance. I distrust the correctness of my own opinions in opposition to theirs, but with a clear conviction that the official bond of the notary extends to and secures nothing more than the performance of the official duties imposed upon him by law, and that the crime and fraud of Jones in this case were wholly outside of any duty pertaining to his profession as notary, I am constrained to put upon record the reasons upon which my conclusions are based.

No. 3451.

A. B. MILLER VS. D. C. CHANDLER.

On the trial of a rule to dissolve an attachment, the truth of all the allegations of the petition can not be inquired into, as that would be trying the case on the merits. Where the affidavit for an attachment attests the truth of all the allegations of the petition, and the petition sets forth the non-residence of the defendant, and a cause of action, the affidavit is sufficient.

The amount of an attachment bond must exceed by one-half, the sum demanded.

No correction, or alterations of a judgment can be made by the court, *ex proprio motu*, after the judgment has been entered on the minutes, except such as are merely clerical, or rectify errors of calculation. No change in the substance of a judgment can be made, save by means of another formal decree, rendered after a new trial of the case.

Paying an employee a certain portion of the profits of a business, in compensation of his services, does not make him a partner of the employer.

29	88
47	1464
29	88
52	1001
29	88
109	548
29	88
123	96

Miller vs. Chandler.

A certificate of discharge in bankruptcy, made according to the forms prescribed in the bankrupt act, is receivable in evidence before any court, to prove the fact of the discharge, and its regularity.

A discharge in bankruptcy is a complete bar to any suit brought against a bankrupt in a State court to enforce a debt which has been extinguished by that discharge.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Hays & New*, for plaintiff and appellee. *B. Egan*, for defendant.

The opinion of the court was delivered by MARR, J.

This suit was brought to recover a sum alleged to be due to plaintiff by defendant for his services as captain of defendant's steamboat *Welcome*. The petition charges that the defendant employed plaintiff and agreed to give him one-third of the earnings of the boat for his services.

On the usual affidavit, process of attachment was issued against the property of defendant, who resided in the State of Arkansas, and the property attached was released on bond.

Defendant moved to set aside the attachment on the grounds —

First—That the affidavit is not true.

Second—That the affidavit is insufficient, and does not justify the issuing of the writ.

Third—That the security on the attachment bond is not good and solvent, or such as the law requires.

Fourth—That the bond is irregular in form, and not sufficient in amount.

First—All the traversable allegations of the petition, except that which charges that the defendant is a non-resident, go to the merits. The defendant might, on a rule, put that allegation at issue, and might have the attachment dissolved, by proving that he resides in the State. But it would be necessary for him specially to deny the alleged non-residence; and the burden would be upon him to disprove that allegation. The general statement that the affidavit is not true where, as in this case, all the allegations of the petition are sworn to, is neither more nor less than a general denial, and the defendant can not, on a rule to show cause why the attachment should not be dissolved, put plaintiff on the proof of his case, or enter into any inquiry as to the merits.

Second—The petition sets out clearly and distinctly a cause of action, *ex contractu* a debt alleged to be due to plaintiff by defendant, and it charges that defendant is a non-resident. The affidavit is that "all the allegations of the foregoing petition are true." There can be no question as to the sufficiency of this affidavit to authorize the order, and to maintain the writ of attachment.

Third—The surety in the attachment bond swore that he resided in the city of New Orleans, and that he was worth more than the amount of the bond. There is room for suspicion that he was merely a temporary sojourner in the State; but his testimony, not contradicted, shows

that he had the requisite qualifications, residence and pecuniary sufficiency.

Fourth—The bond is in the usual form, and the amount is four thousand dollars. The amount sued for is \$2149, with interest from judicial demand. The law requires a bond exceeding by one-half the amount sued for, and a bond for \$3200 would have been ample in this case.

The defendant excepted to the suit on several grounds, all of which were referred to and were tried with the merits.

First—That the petition discloses no cause of action; because the plaintiff alleges a partnership; and he can sue only for a liquidation and settlement of that partnership, not for any particular amount, as claimed in the petition.

Second—That, before this suit was brought, defendant had been made garnishee in a suit in Arkansas in which plaintiff, Miller, was defendant, and in which judgment had been rendered against Miller for \$4050; and that any claim or demand which Miller might have against defendant had been seized by that garnishment.

On the merits defendant answered that he had employed Miller as captain, and agreed to allow him one-third of the net profits of the boat, after deducting two thousand dollars per month for the charter; that plaintiff had served under that agreement from the third of December, 1869, to some time in January, 1870, and that during that time he had drawn \$1001 12.

Defendant also pleads that he is holder and owner of the note of plaintiff for \$3639, dated the thirty-first of May, 1866, payable on demand; and he claims, in reconvention, the amount of that note with interest from the thirty-first of May, 1866; and such further sum as may be found, on settlement of the accounts of the boat, to have been overdrawn by plaintiff.

Plaintiff pleads, so far as the note is concerned, the discharge in bankruptcy granted to him by the Supreme Court of the District of Utah, and files the certificate, which is dated the twenty-second of July, 1869, and relates back to the thirty-first of December, 1868, the date of the filing of the petition for adjudication.

The proof shows that plaintiff received at different times from the clerk of the boat \$1001 12, and that he had returned seven hundred dollars, leaving \$301 12 to be accounted for by him.

It was proven that the proceedings in garnishment were discharged by judgment of the Circuit Court in Arkansas on the fifteenth of December, 1870.

It was also proven that plaintiff remained on the *Welcome*, under his agreement with defendant, four trips, and that the boat paid for loss and damage on fifty-six bales of cotton, and three bales short delivery,

in consequence of which the profits on the four trips were reduced to \$211.

The case was tried and submitted on the fourth of May, 1871; and on the ninth of May, for reasons orally assigned, judgment was entered rejecting the demand of the plaintiff, and the reconventional demand of defendant. The next day the court, *ex proprio motu*, ordered that "the judgment entered yesterday be annulled and made of no effect, as having been entered erroneously;" and, immediately, "for reasons orally assigned in open court," judgment was rendered and entered in favor of plaintiff for \$1289 85, with interest and costs, and privilege on the property attached; and dismissing the reconventional demand.

After an ineffectual motion for a new trial, defendant took a suspensive appeal.

It seems to us the judge of the court below proceeded very irregularly. After having rendered judgment in open court, and having it entered on the minutes, the judge might, indeed, have corrected a mere clerical error, or a mistake in calculation, but to set aside a judgment rejecting the demand of plaintiff, *ex proprio motu*, and to render a judgment, immediately, in favor of plaintiff for a specified sum, with privilege on the property of defendant, thus changing the entire substance and effect of the judgment first rendered and entered, seems to us most extraordinary, and in excess of judicial authority; and we consider this action of the judge so plainly against the letter of the law that we can not give it the apparent sanction of our silence, nor incur the risk of allowing it to become a precedent.

The Code of Practice, article 547, provides that judgments may be amended by the court, until after having been signed—

First—To alter the phraseology, but not the substance.

Second—To correct errors of calculation, if more have been given than was demanded, or if the party in whose favor the judgment was given had been ordered to pay the costs.

"Except in the cases above provided, courts can not alter their judgments; but they may *ex officio* direct a new trial in order to revise their judgments."

When the judge discovered, as it seems he must have done on the reading of the minutes the next morning, that the judgment entered was not that which he had intended to render, it was his duty to have ordered, *ex officio*, a new trial, and to have had counsel of both parties notified. The course which the judge pursued in this case was manifestly in violation of the law as laid down in the Code of Practice; and it shows the importance of requiring the judges to assign in writing the reasons for their judgments, with reference to the law on which they are based, when that is practicable.

Defendant's counsel was mistaken in supposing that plaintiff alleged a partnership; there was no partnership between him and defendant, and the agreement that an employee shall receive a certain part of the profits as compensation for his services, does not make him a partner, even as to third persons, much less with respect to his employer.

The garnishment having been disposed of some months before the trial, both the causes of exception to the suit were properly disregarded. Defendant took three bills of exception, one of which only requires any notice at our hands, and that is the one taken to the ruling of the court in admitting in evidence the certificate of discharge in bankruptcy. Defendant insisted that it should be authenticated as prescribed by the act of Congress of 1790. This act relates to the authentication of the records and proceedings of the courts of the several States; and it prescribes a form of authentication which is obligatory throughout the United States; that is, where the mode of authentication presented by that act is observed, every court in every State is compelled to admit the proof as sufficient. But this act does not relate to proceedings in the Federal Courts, nor does it forbid any State to admit in its courts proof and authentication of the records and proceedings in the courts of the other States different from that prescribed by the act.

The bankrupt act prescribes the form of the certificate of discharge, section 82, Revised Statutes, section 5115, and section 84, Revised Statutes, section 5119, provides that the discharge "may be pleaded by a simple averment that on the day of its date such discharge was granted to the bankrupt, setting a full copy of the same forth in its terms as a full and complete bar, etc., and *"the certificate shall be conclusive evidence in favor of such bankrupt of the fact and regularity of such discharge."*

The plea of the discharge in bankruptcy in this case is in exact conformity with the bankrupt law, section 84, and the certificate is signed by the Chief Justice, attested by the clerk, and has attached to it the seal of the court. That which was presented to the court below as proof of the discharge in bankruptcy, and in support of the plea, is precisely that which the bankrupt act prescribes, and which it declares shall be *conclusive evidence of the fact and regularity of the discharge.*

We think that a certificate of discharge in bankruptcy, signed by the judge, attested by the clerk, under the seal of the court, is not only sufficiently authenticated, but that it is precisely the means by which the bankrupt is to prove and to have the benefit of his discharge.

Congress has exclusive control of this whole subject matter, and its legislation is the paramount law. It is not competent for any court within the territorial limits of the United States to require any other proof of the discharge than that which the act of Congress declares shall be *conclusive evidence*; nor to refuse to give to that evidence and

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to the discharge the effect of a complete bar to all the debts and demands falling within the scope of the discharge.

The liability of plaintiff on the note pleaded in reconvention is completely and forever barred by the plea and proof of his discharge in bankruptcy. He is entitled to one-third of the \$211 net profits earned while he was in the employ of defendant; and he is accountable for the balance drawn by him on account, \$301 12; that is, he is to be charged with \$301 12, and to be credited with one-third of \$211; viz., \$70 34, leaving a balance against him of \$230 78, for which defendant is entitled to judgment, with interest from judicial demand, eighteenth March, 1870.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and annulled, and, proceeding to render such judgment as the court below should have rendered, it is further ordered, adjudged, and decreed that the demand of plaintiff against the defendant be rejected; that the reconventional demand of defendant against plaintiff for the amount of the note for \$3639, with interest from the thirty-first May, 1866, its date, be also rejected; and that on the remainder of the reconventional demand there be judgment in favor of the defendant appellant David W. Chandler against the plaintiff appellee Andrew B. Miller, for the sum of \$230 78, with interest at the rate of five per cent per annum from eighteenth March, 1870, until paid, and costs in both courts.

No. 3941.

SUMMERS & BRANNINS VS. J. S. CLARK.

If an importer of foreign goods has so gravely violated the revenue laws of the United States as to render the goods liable to confiscation, and himself obnoxious to the penalties of his act, prescribed by said laws, he will become liable to any innocent purchaser of those goods, for whatever sums the purchaser may have to pay the government, in order to compromise the suit to confiscate the goods; and for all necessary expenses incurred by such purchaser, in effecting the compromise. Such a compromise inures to the direct relief of the importer, which makes the latter liable for whatever the compromise has cost the former.

Where, by the terms of the United States revenue law, the penalty of its violation is the forfeiture of the goods without alternative, then the property in said goods vests at once in the government, and no purchaser of said goods, however innocent, can acquire any title to them. They remain liable to seizure and confiscation, wherever found.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Labatt & Aroni and Hudson & Fearn*, for plaintiffs and appellants. *Billings & Hughes and William H. Hunt*, for defendant.

The opinion of the court, on the original hearing, was delivered by

MORGAN, J., on the rehearing by MARR, J., and the application for a second rehearing by MANNING, C. J.

Section fifty of the acts of 1799, approved second of March, (United States Statutes at Large p. 655) provides that if any goods brought in any ship or vessel, from any foreign port, shall be unladen, between the setting and the rising of the sun, except by special license from the collector of the port, the goods shall become forfeited.

Section three of the act approved sixth of August, 1846, provides that if any warehoused goods shall be fraudulently concealed in or removed from any public or private warehouse, the same shall be forfeited to the United States.

Section four of the act of eighteenth of July, 1866, provides that if any person shall *fraudulently or knowingly* import, or shall *receive*, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such goods, *knowing the same to have been imported* contrary to law, such goods shall be forfeited.

On the twenty-fourth of May, 1869, the collector of the port of Louisville seized 1089 barrels and 254 packages of sugar as having been brought into the United States in contravention of the laws above quoted, and the United States attorney libeled the same, and asked for the condemnation of the property. In whose hands the sugars were seized does not appear.

Plaintiffs, who reside in Louisville, aver that the sugars in question were shipped to them by H. N. Soria & Co., of New Orleans, and that they were sold by them (plaintiffs.) That the sugars were for a long time in danger of being confiscated; that the persons to whom they had sold them, and in whose possession they were when seized, were innocent vendees, and that they (plaintiffs) were bound to "stand by them" and protect them from loss, which they did. They aver that after great exertions they succeeded in effecting a compromise with the government, to accomplish which they were obliged to pay, and did pay, in duties, costs, expenses, and charges, \$11,041 41.

They then aver that H. N. Soria & Co. were merely the agents of James S. Clark, the defendant, who, they allege, was the real owner of the sugars, and that he merely used Soria & Co. to carry out his designs. They aver that if they had not compromised with the government the sugars would have been confiscated. They say that they deemed it in the best interest of all parties to make the compromise, and that, as *negotiorum gestores*, they did so. They pray for judgment against the defendant in the sum claimed, as above set forth.

The action, therefore, is one instituted by a *negotiorum gestor* for the reimbursement of money spent by him in the interest of his principal. Primarily, whose interests were the plaintiffs protecting when they made

the alleged compromise? Evidently, the parties in whose hands the sugar was seized, for it was their property, and it was they who were in danger of loss.

Whose interest did they represent, in the second place? Their own, because they allege that if the sugars had been condemned they would have been obliged to make good the loss to the holders thereof, their vendees.

But they say that Clark committed the fraud; that Clark shipped the sugars to them; that they sold them to third parties; that without the compromise the sugars would have been condemned, in which event they, innocent venders, would have had to shoulder the burden of their innocent vendees, and that Clark who perpetrated the alleged fraud upon the government and procured them to pass off the property is bound to reimburse them what they paid to prevent the loss attaching to their vendees.

A *negotiorum gestor* is one who spontaneously and without authority undertakes to act for another during his absence in his affairs. Bouvier's Law Dictionary, vol. 2, p 170. His agency springs from an emergency, and his action is taken on the spur of the moment. The action must be intended to benefit the person in whose favor the action is taken, and must benefit him. In this event he is responsible for the expenses incurred by his self-constituted agent. Now the plaintiffs were not the agents of Clark when the compromise was effected. The compromise was not effected in his name. Their connection with Clark ceased when they disposed of the sugar shipped by Soria & Co. to them, assuming Clark to have been the owner thereof, and their returns thereof had been made and acknowledged. If they acted for him in regard to the compromise it was not because of any contract between them, or from any obligation under which they rested, but it was in what they supposed to be the interest of the defendant.

The plaintiffs reside, as we have seen, in Louisville. The defendant resides in New Orleans. Between the two cities there is rapid communication by rail, and almost instantaneous communication by telegraph. When the sugars were seized by the government, communication between the two places was not interrupted. Some ten months intervened between the date of the seizure of the sugars and the compromise, and although it appears that one of the plaintiffs was once in this city, and although they had sent counsel here from Louisville to examine into the facts upon which the libel was based, no demand whatever was made upon Clark, and no call was made upon him to defend the suits or procure the release of the property libeled. The compromise, therefore, was the voluntary act of the plaintiffs, and made without reference to Clark. They certainly had no power to spend his money in that way without his

consent, when they could have notified him of the danger he was in, and at least called upon him to protect himself and them.

Judgment affirmed.

TALIAFERRO, J. For the reasons above stated, and others, I concur in the decree.

Justices Howell and Wyly reserve the right to file dissenting opinions.

ON REHEARING.

About the month of October, 1868, an arrangement was made between James S. Clark and H. N. Soria & Co., of New Orleans, for the importation of Havana sugars, to be purchased by Clark and consigned to Soria & Co. for his account. Soria & Co. were to provide a bonded warehouse, or, as Soria expresses it, "a bonded warehouse was to be *fixed up*," at New Orleans, in which the sugars were to be stored, subject to such disposition as Clark might indicate, and Soria & Co. were to be paid a commission of one dollar per box.

Clark went to Havana and purchased the first lot of sugar, and thus inaugurated the business. This and all the subsequent purchases were made with means furnished by Clark, and Soria & Co. were interested only to the extent of their commission.

Soria & Co. obtained the necessary authority, and became the proprietors of and opened the warehouse, and the sugars, as they arrived from Havana, were received by them, the consignees, and were stored in this warehouse.

In the latter part of 1868, or early in 1869, Clark sought an introduction to Edwin H. Summers, of the firm of Summers & Brannins, and opened negotiations for advances on Havana sugars, to be shipped by Soria & Co. E. H. Summers, A. O. Brannin, and John S. Brannin composed the New Orleans firm of Summers & Brannins, and they were also partners, factors, and commission merchants, under the style of Brannin, Summers & Co., at Louisville, Kentucky, where the Brannins resided. Summers informed Clark that his New Orleans firm would make proper advances on consignments to the Louisville firm.

Shortly after this interview, Soria, by direction of Clark, called on Summers & Brannins, and the negotiations were completed. Sundry shipments of sugars were made by Soria & Co. to Brannin, Summers & Co., on which large advances were made by Summers & Brannins, covered by six drafts of Soria & Co. on Brannin, Summers & Co., of different dates, from the fifteenth of February to the eighth of March inclusive, aggregating seventy-three thousand five hundred dollars, maturing at different periods, the latest on the sixth of May, 1869.

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The demand for these sugars was not very active, and some time in April, Soria, by direction of Clark, went to Louisville and instructed Brannin, Summers & Co. to have them transferred from the boxes, the original packages, into barrels, for the reason, as stated by him to Brannin, Summers & Co., that "the goods would be more salable in that shape than in boxes." He testifies, however, that the real object which Clark had in view in ordering this change was "*to prevent identification.*"

The sugars remaining on hand at the time this change was made were sold by Brannin, Summers & Co., and soon after, before they had been paid for, on the twenty-fourth of May, 1869, they were seized in the hands of the several purchasers, and were proceeded against by the government, in six separate suits, in the United States District Court at Louisville for condemnation and forfeiture under the revenue laws.

Brannin, Summers & Co., who, according to the testimony, had no suspicion of any fraud or irregularity, either in the importation or the subsequent shipments to them, were alarmed at these seizures, which threatened heavy pecuniary loss to them, and serious impeachment of their reputation as merchants. They employed eminent counsel, who undertook the defense, and procured the release of the seizures on bond.

On the first of June John K. Goodloe, one of the counsel thus employed, left Louisville for New Orleans in company with John S. Brannin, to ascertain the history of the alleged frauds and causes of forfeiture. The information which they obtained, after thorough investigation and examination of the records at the Custom-House, satisfied Mr. Goodloe, a lawyer of large experience, "that the government had in its possession evidence sufficient to insure a condemnation and forfeiture of all the sugars seized at Louisville," as he testifies.

Soon after the seizures were made Summers, having ascertained that the duties had not been properly paid, had an interview with Clark, in which he told Clark he believed that he, Clark, was connected with this matter, and that he would hold him personally responsible. Clark denied having any connection with it, except that Soria owed him money.

A. O. Brannin also visited New Orleans in reference to these seizures, and having been informed by Soria that Clark was the owner of the sugars, he called on him. The result of this interview is not stated, but it is evident that Soria & Co. and Clark were aware of the proceedings at Louisville which involved such serious consequences to them.

On the return of Mr. Goodloe to Louisville, upon his statement of the facts ascertained by him at New Orleans, the two legal firms employed by Brannin, Summers & Co. were satisfied that the government would be able to make out a clear case of forfeiture, and they advised that an application for a compromise and remission of the forfeiture should be made at once to the Secretary of the Treasury. The application was

made, and the compromise was recommended by the District Attorney, B. H. Bristow, and by the surveyor of the port of Louisville, both of whom knew the reputation of Brannin, Summers & Co., and were convinced of their entire innocence of the alleged fraud upon the government.

The Secretary of the Treasury did not act promptly on this application, and Mr. Goodloe went to Washington to urge it in person. Finally, in January, 1870, after much trouble and expense, and upon the personal representations of Mr. Goodloe and Mr. Bristow, who was at Washington at that time, the forfeiture was remitted, and the District Attorney who had succeeded Mr. Bristow was instructed to dismiss the proceedings on payment of the duties at three cents a pound and all fees and costs. These terms were promptly complied with, and on the twenty-first of January, 1870, the suits were dismissed.

Mr. Goodloe testifies that this was the most favorable settlement that could have been obtained, and that the sugars, if tested by the government standard, would have been subject to a higher duty. He attributes this result as much to the high character, social and commercial, of the members of the firm of Brannin, Summers & Co. as to the efforts of themselves and their counsel.

Brannin, Summers & Co. made up their account with their consignors, Soria & Co., in which they charge all the advances made, duties, costs, fees, and expenses paid, and credit the proceeds of all the sugars, showing balance due by Soria & Co., twenty-seventh of January, 1870, \$11,041 41. This account was presented to Soria & Co. by Summers & Brannins, and it was acknowledged to be correct and satisfactory by Soria & Co. in writing at the foot of the account. Brannin, Summers & Co. charged this balance to Summers & Brannins, and this suit was brought against Clark to recover that balance, \$11,041 41, with five per cent interest from the twenty-seventh of January, 1870.

The petition charges that Clark was the owner of the sugars, the real party in interest; that Soria & Co. were merely his agents; that he suppressed his name as principal for purposes of his own, and used the name of Soria & Co. to carry out his designs; that the government claimed that the sugars had been fraudulently introduced through the Custom-House at New Orleans from Havana, and were actually seized at Louisville, in the hands of innocent vendees, and that they were for a long time in jeopardy of actual confiscation.

The petition states the good faith and the innocence of the plaintiffs; their efforts to save the sugars from forfeiture; the expenses incurred and paid by them; the beneficial results to Clark, and his obligation to reimburse them as *negotiorum gestores*.

Clark answered on the thirtieth of March, 1870, simply pleading a gen-

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eral denial. The trial commenced in the lower court on the seventeenth of December, 1870, and the case was finally submitted on briefs on the twenty-third of December, 1871, and on the twenty-eighth of February, 1872, for reasons orally assigned, "the law and evidence being in favor of defendant," judgment of nonsuit was entered, from which the plaintiffs appealed.

Summers died pending the appeal, and his widow and administratrix was made a party in this court. Our predecessors, on the twenty-third of May, 1876, affirmed the judgment of the court below, and the case is before us on the rehearing granted by them.

We do not find in the pleading, nor in the several printed arguments filed by counsel for the appellee, that he raises any question as to the ownership of the sugars; nor do we think that he could have done so successfully. Soria testifies that Clark was the only person known to him as the owner, and that he paid Clark all the money advanced on the sugars, and all that was received from proceeds of sales. There is no room for doubt as to Clark's ownership, and his failure to testify in his own behalf, and to offer any testimony to contradict that of Soria, relieves us of the necessity of further inquiry as to his relations to these sugars.

The counsel for appellee rest the case upon the law. They maintain that the sugars were not liable to forfeiture; that Brannin, Summers & Co. were bound to have defended the suits in which the sugars were seized; that they did not give Clark proper notice of the seizures, and that if they were in good faith their innocence would have protected them and their innocent vendees, and there would have been no difficulty in obtaining a full remission of all penalties and expenses. "But they threw away this opportunity, and preferred to make the compromise."

"If, on the other hand," counsel argue, "appellants were implicated in the fraud, then the compromise was useful and necessary, and highly advantageous to themselves." "But they are not permitted to claim a contribution from their confederates. *Ex turpi causâ non oritur actio*."

We do not find in the record the slightest foundation for the application of the maxim *ex turpi causâ*. On the contrary, the good faith of appellants is not only not impeached by any testimony in the record, but it is, moreover, fully shown by the testimony of A. O. Brannin, E. H. Summers, John K. Goodloe, and B. H. Bristow; and the appellee has had the full benefit of the entire innocence of the appellants in the favorable compromise by which the sugars were saved from forfeiture.

It is not the habit of the Secretary of the Treasury to remit forfeitures after condemnation, and the chances of a favorable compromise, in any case, are greatly diminished by a judgment after a protracted litigation.

As to notice to Clark, the proof is positive that he was informed by Summers of the seizures soon after they were made, and when Summers told him he would be held responsible he denied having any connection with the sugars. Certainly he can not be heard to complain of want of notice after this.

Within less than ten days after the seizures John K. Goodloe and John S. Brannin came to New Orleans for the special purpose of obtaining information about these sugars with a view to the defense of the suits, and they spent a week in this investigation, which was minute, the collector giving them access to the records of the Custom-House. Summers assisted them, and it can not be that they failed to call upon Soria & Co., the shippers of the sugars, and Clark, who had opened the negotiations with Summers. Soria & Co. and Clark must have known of the mission of Goodloe and Brannin, and they could not have been ignorant of the peril to which the sugars were exposed.

With every opportunity afforded him by a singularly protracted trial, Clark did not offer any testimony tending to exonerate him from liability in the present suit, and the presumption is that if any fact had existed which would have shown that the sugars were not liable to condemnation he would not have failed to plead and prove that fact in the present suit, with so much the better reason and greater effect if no opportunity had been offered him to make the same proof in the proceedings at Louisville.

The real questions to be determined in this case are :

First—Were these sugars liable to condemnation and forfeiture in the hands of the innocent purchasers ?

Second—Was Clark benefited by the compromise effected by Brannin, Summers & Co ?

First—The libels under which the seizures were made contain four counts, charging: 1. Violation of section fifty of the act of Congress approved second of March, 1799. 2. Violation of section four of the act approved eighteenth of July, 1866. 3 and 4. Violation of the act approved sixth of August, 1846, section three.

Section fifty of the act of 1799 prohibits the unlading of any imported goods between the setting and the rising of the sun without a special license from the collector and the naval officer of the port; and it also forbids the unlading of such goods at any time without a permit from the same officers, under penalty, in both cases, of forfeiture of the goods. To obtain a permit, the goods must first be entered at the Custom-House, and the duties paid, or secured to be paid.

Section four of the act of 1866 subjects to the penalty of forfeiture goods fraudulently or knowingly imported or brought into the United States contrary to law, and this penalty is wholly independent of the fine

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and imprisonment imposed upon the guilty parties, their aiders and abettors, on conviction.

Section three of the act of 1846, known as the warehousing act, relates to the fraudulent concealment in, and the fraudulent removal from, any public or private warehouse, of any warehoused goods, under penalty of forfeiture of the goods; and the guilty parties are also subject to criminal prosecution, and to fine and imprisonment on conviction.

Soria testifies that there were seven hundred and fifty boxes of these sugars per De Sota, which arrived from Havana on the twenty-seventh of January, 1869, of which five hundred boxes were shipped to Brannin, Summers & Co. "There was no entry made of the seven hundred and fifty boxes at the Custom-House." How easy it would have been to disprove this statement by the records of the Custom-House if it were not true.

Another lot, two hundred and seventy boxes, per Santiago de Cuba, shipped to Louisville thirteenth of February, 1869, of which Soria says, "No entry was made at the Custom-House that I know of." As Soria & Co. were the consignees, and had the invoices and bills of lading, they were the proper persons to make the entry, and Soria would have known if the entry had been made.

There were twenty-one hundred and fifty boxes per Ida M. Conery which arrived first of March, and on the same day Soria & Co. gave a warehousing bond for this lot. On the second of March one thousand boxes of the twenty-one hundred and fifty were shipped by Soria & Co. to Louisville "before the permit was granted," as Soria testifies. On the third of March one Sheldon gave a bond for the transportation of the whole twenty-one hundred and fifty boxes to Cincinnati, and on the fifth of March permit was given for the delivery of these twenty-one hundred and fifty boxes for transportation to Cincinnati.

The transportation bond was canceled, when or how it does not appear, but it was conditioned for the delivery to the collector at Cincinnati, and the entry there for rewarehousing, and it should not have been canceled until compliance with the condition had been properly proven.

Soria says these sugars went into his bonded warehouse, and that all the sugars shipped by Soria & Co. to Louisville were taken from this warehouse. Two importations, seven hundred and fifty and two hundred and seventy, in all one thousand and twenty boxes, were not entered at the Custom-House, and one thousand boxes were shipped before the permit was granted, and that permit was granted on the fifth of March, for twenty-one hundred and fifty boxes for transportation to Cincinnati, when one thousand of the boxes were on their way to another port, Louisville, having been shipped three days before the date of the

permit, consigned to Brannin, Summers & Co., just as if the duties had been fully paid at New Orleans.

Soria says: "Mr. Clark ordered me when, where, and to whom to ship. I gave these orders to the drayman, who went there, and they were delivered by the man who was in charge of the bonded warehouse, and shipped in accordance with these instructions."

The testimony of Soria, in no way contradicted, is confirmed by Clark's failure to testify, and fully warrants the conclusion that Clark purchased these sugars at Havana with the intention to import them into the United States and to put them on the market without paying the duties, and that the consigning them to Soria & Co., and the *firing up* of the bonded warehouse, to be kept and controlled by Soria & Co., were but the means and instrumentality, prearranged, by which this design was intended to be, and was, in fact, accomplished. It is difficult to conceive of any defenses which could have been made to the suits brought by the government for the condemnation and forfeiture of these sugars.

The counsel for appellee have failed to observe an obvious distinction, and they are mistaken in asserting that the innocent purchasers could have protected themselves against the proceedings by the government for the condemnation and forfeiture of these sugars by proving their innocence.

Where, by the terms of the law, the penalty is in the alternative, the forfeiture of the goods or of the *value thereof*, the title to the goods does not vest in the government until it has elected whether to proceed for the goods or for the value thereof. Any purchaser in good faith between the time of the committing of the offense and the election by the government would acquire a good title to the goods, and the government would be compelled to take the alternative, and to proceed against the offender, the owner or agent or consignee, for the value.

Where, by the terms of the law, the penalty is the forfeiture of the goods, without alternative, as in section fifty of the act of 1799, section three of the act of 1846, and section four of the act of 1866, under which these sugars were seized, the title vests in the government from the moment the offense is committed, and no adverse title can be acquired by any one, nor can any right accrue to any person whomsoever, after the commission of the offense, by which the title of the government, and the right to seize the goods, wherever they may be found, and to have them condemned and forfeited, can be in any manner affected or impaired.

This distinction is plainly laid down in Caldwell's case, 8 Howard, and in Henderson's case, 14 Wallace. The United States vs. Grundy, 3 Cranch, is an example under the registry act of thirty-first of December, 1792, section four, in which the penalty for false swearing in registering a

vessel is the forfeiture of the vessel or the value thereof. And the United States vs. Certain Bags of Coffee, 8 Cranch, and Gelstap vs. Hoyt, 3 Wheaton, are examples under statutes in which the penalty is forfeiture, in the one case of the goods, in the other case of the vessel.

It is not material to determine whether the facts proven in this case bring it within section fifty of the act of 1799, or within section three of the act of 1846, or within section four of the act of 1866. We entertain no doubt that the offenses mentioned in these three sections were committed. A permit requires a previous entry, and as no entry was made of one thousand and twenty boxes of the imported sugars, they must have been unladen without a permit, and thus have incurred the penalty of forfeiture under the act of 1799.

The proof satisfies us that these sugars were purchased and brought into the United States with the intention to evade the payment of the duties, and that they were subject to forfeiture under the act of 1866.

It is plainly proven that these sugars were fraudulently removed from the bonded warehouse of Soria & Co. by direction of Clark, the owner, through the agency of Soria & Co., the consignees, in accordance with the plan pre-arranged; and the penalty of forfeiture under the act of 1846 had been incurred beyond doubt or question, as we think.

It is not necessary to pursue this branch of the subject further. The story told in this record is one of systematized fraud upon the revenue, which could not have been practiced on so large a scale and with such success without the guilty connivance and complicity of some of the officers of the government charged with the collection of the customs at New Orleans.

Counsel for appellee argue that the act of August 6, 1846, is supplied and repealed by the act of the eighteenth of July, 1866. We do not think so. The act of 1846, section three, relates to the fraudulent concealing in, or the fraudulent removal from, any public or private warehouse of any warehoused goods; while section four of the act of 1866 relates to the fraudulent importation of goods. Goods may be imported fairly and legally, so that there could be no pretense of a violation of section four of the act of 1866; and the same goods might be afterward fraudulently concealed in, or fraudulently removed from, the public or private warehouse in which they were stored in bond, and the penalty of forfeiture, under the act of 1846, section three, might be incurred without the violation, up to the time of such fraudulent concealment or fraudulent removal, of any other statute of the United States.

Besides, we find section fifty of the act of 1799, section three of the act of 1846, and section four of the act of 1866, re-enacted in the Revised Statutes of the United States, sections 2867, 2872, 2873, 2987, and 3082.

If either Clark or Soria knew any fact, knew of any means, by which

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the sugars could have been saved from forfeiture, it was their duty, and they had ample time and opportunity, to have given the information to the parties at Louisville, or, at least, to have communicated the facts and means of defense to Summers & Brannins, who had advanced on the sugars beyond their value, deducting the duties. When Summers charged Clark with responsibility, instead of furnishing the means to defeat the claim of the government Clark denied having any connection with the business, except that Soria owed him money, while Soria testified that Clark was indebted to him.

It is too plain to admit of question that there was no fact or circumstance known to Clark or to Soria which would have been available against the claim of the government for the absolute forfeiture of these sugars, and neither Clark nor Soria made any attempt to relieve the purchasers, or gave any assistance to Brannin, Summers & Co., who stood between them and the purchasers.

These sugars were not merely in jeopardy, they were clearly liable to forfeiture; and the innocence of Brannin, Summers & Co., and of the purchasers from them, would have afforded no protection against the right and claim of the government.

Second—If the sugars had been condemned, the purchasers would have had recourse, immediately, on Brannin, Summers & Co., and they, in turn, would have been entitled to recover their disbursements and expenses from Clark, the owner of the sugars.

In *Meredith vs. the United States*, 13 Peters, 494, it was decided that the duties on imported goods constitute a personal debt and charge upon the importer, as well as a charge upon the goods. The amount of duties paid by Brannin, Summers & Co. on the sugars seized was \$8593 62 in gold, equal, at the time the payment was made, to \$10,484 22 in currency. Neither innocence nor any other circumstance would induce or authorize the Secretary of the Treasury to abandon the right of the government to be paid the full duties on imported goods, and as Clark was bound, at any rate, to pay the duties, he was benefited to that extent, at least, by the payment made by Brannin, Summers & Co.

We are not satisfied that the relations of Brannin, Summers & Co., as factors and agents to Clark, the owner of the sugars consigned to them for sale, had ceased when the seizures were made; but we do not care to inquire whether their agency still continued, or whether it had terminated, and they are to be regarded in all that they did with respect to the sugars after the seizures as *negotiorum gestores*. It is a principle of law and of right that no one shall enrich himself at the expense of another. Brannin, Summers & Co., at great expense of time and money, saved Clark from the consequences of the condemnation of property worth more than five times as much as they claim of him, and it

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would be an outrage upon justice to allow Clark to enjoy all the benefits of the outlay of money and of the services of Brannin, Summers & Co., occasioned solely by his violation of the revenue laws, without any obligation on his part to reimburse them.

The account sued on was acknowledged and approved by Soria, who, with respect to this entire business, was the *alter ego* of Clark, and it is sufficiently proven by other testimony in the record. We are satisfied that Clark is bound, legally, and *ex aequo et bono*, for the full amount sued for; and that appellants are entitled to judgment as prayed for in their petition.

It is therefore ordered, adjudged, and decreed that the decree rendered herein by our predecessors on the twenty-third of May, 1876, be set aside and avoided; that the judgment of the Sixth District Court appealed from be also avoided and reversed; and, proceeding to render such judgment as the court *a qua* should have rendered, it is further ordered, adjudged, and decreed that Summers & Brannins, plaintiffs and appellants, now represented by Mrs. S. S. Summers, widow and administratrix of Edwin H. Summers, deceased, Abram O. Brannin, and John S. Brannin, do have and recover of and from James S. Clark, defendant and appellee, the sum of \$11,041 41, with interest at the rate of five per cent per annum from the twenty-seventh of January, 1870, until paid, and costs in both courts.

FOR A SECOND REHEARING.

MANNING, C. J. An opinion was read and judgment rendered in this cause last year. Upon application for a rehearing it was granted, and a second judgment was rendered. This is an application for another rehearing. We have said in the "succession of Milton Taylor," wherein a similar petition was presented, that it is an innovation upon the established practice of this court, and is not warranted by the Code of Practice. For that and other reasons this day assigned in rejecting the application in that cause, the prayer in this suit is refused and denied.

No. 6561.

JOHN A. STEVENSON ET AL. VS. D. A. WEBER ET AL.

The action to annul a judgment must be brought before the court which rendered it. Jurisdiction can not be given to a district court, by aggregating a number of co-plaintiffs, or co-defendants, where the sum claimed by, or demanded of, each, is less than five hundred dollars.

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Stevenson vs. Weber.

A district court can not enjoin the execution of a judgment rendered by a parish court.

The action to annul a judgment is prescribed in one year from the date of the judgment.

APPEAL from the Seventh Judicial District Court, parish of West Feliciana. *Hewes, J.*

W. W. Leake and Wickliffe & Fisher, for plaintiffs and appellants.

S. J. Powell and Kennard, Howe & Prentiss, for defendants.

The opinion of the court was delivered by

SPENCER, J. The facts of this case are as follows:

Picard & Weil, Stephen C. Sterling, the succession of W. D. Winter, deceased, and Samuel J. Powell each held the outstanding scrip of the parish of West Feliciana. They respectively instituted several suits against the parish, and after a protracted contest obtained judgments fixing the amount of indebtedness, and also ordering the assessment and collection of parish taxes to pay them under act No. 69 of 1869.

Two of these suits, to wit: No. 2496, C. J. Howell, for use, etc., and No. 2523, L. P. Day, for use, etc., being for amounts exceeding five hundred dollars, were instituted in the district court; and judgments were rendered in favor of plaintiffs.

All the remaining suits being for amounts less than five hundred dollars were instituted in the parish court. In that court there was judgment in each case in favor of the parish, and plaintiffs appealed to the district court. All the judgments of the parish court were reversed by the district court on appeal, and judgments rendered in favor of plaintiffs and their execution ordered under act No. 69 of 1869.

The demand in suit No. 2496—Howell, for use, etc.—was for his commissions as tax collector for collecting parish taxes for 1871. The demand in No. 2523—Day, for use, etc.—was for building a bridge under a special ordinance of the police jury in 1871. The demands in the other suits were for sheriff's fees in criminal cases, coroner's fees, jurors' fees, parish attorney's salaries, criminal expenses, expenses of the police jury, etc., being the current expenses of the parish in part of the years 1868 to 1872.

The parish of West Feliciana had by special ordinance of long standing required that all claims for its current expenses should be presented to the parish auditor; that they should be receipted by the creditor, and the auditor should issue his warrants on the treasury therefor.

In issuing these warrants (which it seems were payable to order or bearer) the auditor frequently, for convenience of holders, when the claims were larger, subdivided the debt, and therefore several warrants were predicated upon the same claim or account, and these warrants

being transferable, became scattered in different hands, several persons holding-warrants resting on the same claim.

It seems that in "Sterling vs. West Feliciana," 26 An. 59, this court held that no action would lie on these warrants, because the parish was without authority to issue negotiable paper, the court intimating on a rehearing that the parish might be sued on the original claims upon which these warrants were based and issued. Under the view we have taken of this case we are not called upon to pass upon these conclusions of our predecessors; but we see no good reason why a parish, if it honestly owes a debt, may not give an acknowledgment of it. True, this acknowledgment or warrant, even if negotiable in form, would not be commercial paper, or protected by the rules applicable to such paper, but it certainly would, if issued by authority of the parish for a just debt, be *prima facie* evidence of an obligation, and such as would sustain an action.

The said creditors, taking the hint thrown out by this court, brought against the parish twenty-seven suits—Picard & Well brought five suits, two in the district court and three in the parish court; Powell brought two in the parish court; Sterling brought ten suits in the parish court; Mrs. Winter, administratrix, brought ten suits in the parish court. The plaintiffs declared on the original claims or debts, filing the warrants issued therein, and alleging the repudiation of the warrants by the parish.

These suits seem to have been vigorously and thoroughly defended in both courts, and there seems now to be no question as to the justness of the claims as debts of the parish. The twenty-five suits instituted in the parish court were decided against the plaintiffs therein, who appealed to the district court. The district court reversed the judgments of the parish court in all the cases and gave judgments for the plaintiffs, as it did also in the two cases originally brought therein. The court directed the assessment and collection of taxes to pay these judgments, according to act 69 of 1869. The defendants sought to appeal from these decisions in the parish-court cases, but it was refused. The only ground upon which such appeal could have been asked was that the tax imposed was illegal or unconstitutional. We are not called upon to say whether the appeal would in such case lie from the district court, as the parties made no effort to enforce their right, if they had any, by application to this court. These twenty-seven judgments became final, neither the parish nor the taxpayers who are plaintiffs in the suit at bar appealing therefrom.

The board of assessors designated in the judgments proceeded to assess taxes to pay them in conformity to the decrees, and in their estimates they added nearly seventy-five per cent to the amount of the debt,

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to cover anticipated delinquencies. This was clearly illegal and excessive. They had no such right or power under the law.

These taxes, amounting to twenty and a half mills on the dollar, having been thus assessed, the collector proceeded to collect them, giving notices that unless paid he would seize and sell, etc.

Thereupon several hundred taxpayers, whose names are set out in the petition, brought this suit in the district court enjoining the collection of the taxes so levied in execution of said judgments. They allege that they own several hundred thousand dollars of taxable property in said parish, and that their taxes under said judgments exceed five hundred dollars. They join all the said creditors as defendants in the suit, and pray that said judgments and the proceedings thereunder in execution of them be declared null and void for many reasons which it is not necessary to state.

The defendants plead the following peremptory exceptions:

First—That the district court was without jurisdiction *ratione materię*.

Second—That the judgments attacked were *res adjudicata*.

Third—Prescription of one year.

So far as relates to the twenty-five suits brought in the parish court, it is manifest that an action to annul them can not be brought in the district court, for two reasons: First, because actions of nullity of judgments must be brought before the courts that rendered them. C. P. 608, 609. Secondly, because the amount of each judgment attacked is less than five hundred dollars. The plaintiffs can not give jurisdiction to the district court by aggregating their own interests on one side and opposing them to the interests of sundry persons holding distinct rights aggregated on the other side. Nor can an injunction be taken in the district court to prevent the execution of a judgment of the parish court. The assessment and collection of the taxes under the judgments of the parish court were only acts done in execution, and the injunction to restrain it must be taken out in the parish court. 23 An. 329. We think the exorbitant assessments good ground for injunction, but we can not grant relief in this action so far as relates to the parish-court cases.

So far as the action of nullity is directed against the judgments rendered in the suits (No. 2496 and No. 2523) brought in the district court, we think the plea of prescription of one year must prevail. The judgment in the first-numbered case was rendered on the twentieth of November, 1873, and in the latter on the twenty-first of June, 1874. This suit was brought and filed on the twenty-second of November, 1875—more than one year after said dates. But the plaintiffs are entitled to relief against the assessments to pay these two judgments, and the injunction should be perpetuated as to them, and the said assessment set aside and avoided.

 Stevenson vs. Weber.

It is therefore ordered, adjudged, and decreed by the court that the judgment appealed from be avoided and set aside, and it is now ordered and decreed that plaintiffs' suit, so far as it demands the nullity of the judgments rendered in suits brought before the parish court be dismissed and their injunction to the same extent set aside, reserving the plaintiffs' rights to proceed in the parish court according to law, and that plaintiffs pay costs of both courts so far as relates to these parish court cases.

It is further ordered and decreed that plaintiffs' demand, so far as it relates to the nullity of the said two judgments in suits brought before the district court, be rejected; that the assessment of taxes under said two judgments be annulled and avoided, and that the board of assessors levy a new assessment according to law, at a rate per cent sufficient to pay said judgments; and that plaintiffs' injunction as to the existing assessment for said two judgments be perpetuated; that Picard & Weil, plaintiffs in said two suits, pay costs of this suit as to those in the lower court, and plaintiffs those of this appeal.

 No. 6453.

THE NEW ORLEANS REPUBLICAN PRINTING COMPANY VS. A. DUBUCLET,
TREASURER. H. NEWGASS, INTERVENOR.

A *devolutive* appeal from a decree, refusing a mandamus on the Treasurer to compel him to pay relator a certain sum of money, will not restrain said sum in the Treasurer's hands.

A PPEAL from the Superior District Court, parish of Orleans. *Lynch,*
A J.

H. H. Walsh, for intervenor and appellant.

John Ray, for defendant.

The opinion of the court was delivered by

SPENCER, J. On the eighteenth of April, 1876, the plaintiff filed a petition in the Superior District Court, alleging that said Company by contract became State Printer, and that for necessary work and material furnished during 1874 and 1875 the Auditor of Public Accounts had drawn his warrants in its favor on the treasury, against the "general fund" for those years to an amount exceeding \$10,000, which warrants are now held by petitioner. That frequent and repeated demands for their payment had been made of the Treasurer, without effect, his excuse being want of funds. That for both of said years the Legislature had made appropriations largely in excess of the revenues, and that the Auditor had issued his warrants for said appropriations, without dis-

crimination as to whether they were for necessary expenses of the State government or not. That under the late amendments to the constitution it is made the duty of the Legislature to provide for the payment of all necessary expenses of the State government out of the revenues, and it is further provided that the revenues of each year shall be devoted solely to the expenses of said year, and that all appropriations in excess of revenues shall be null. That the Supreme Court in "State vs. Clinton, Auditor, et al." decided that the necessary expenses of the government must first be paid before those for other purposes, and that in case of excess of appropriation over revenues, those for other than necessary State expenses must fail. That the character of an appropriation is a judicial question, and not to be left to the discretion of the executive officers. That under the system adopted by the Treasurer he can and does disburse the funds as he pleases. Petitioner therefore prays for an injunction forbidding the Treasurer paying any warrants on the general funds for 1874 and 1875 until after it shall be determined judicially whether each warrant was drawn for necessary expenses of the government, and be prohibited from paying any such warrants not so adjudged until after all those for necessary State expenses have been paid, etc.

A rule *nisi* was issued against the Treasurer, to show cause on the twenty-seventh of April, 1876, why the injunction should not be granted as prayed for, and, pending the rule, restraining him as prayed for. On the twenty-seventh of April the Attorney General, for the Treasurer and State, filed an exception for answer, "that the said petition and the allegations therein contained are not sufficient in law to authorize the relief prayed for in the same."

On the twelfth of May, 1876, Herman Newgass filed an intervention, alleging that he held and owned \$6323 80 of judges' warrants, drawn on the general fund of 1875; that he has made frequent and repeated demands of the Treasurer for their payment, without effect, the excuse always being that there were no funds. He alleges that these judges' salary warrants are for necessary expenses of the State government; that the Legislature for the year 1875 made appropriations far in excess of the revenues, and that the Auditor has drawn his warrants therefor without discrimination; that said salary warrants must be paid by preference to those not for necessary expenses of the government. He adopts generally the allegations of plaintiff, and alleges that he verily believes there is a large amount of money in the treasury "and now held by the Treasurer, by reason of an injunction from this honorable court." He prays for judgment decreeing his warrants to be for necessary expenses of the government, entitled to be paid out of revenues of 1875 in preference to ordinary debts and appropriations, and for a mandamus on the Treasurer commanding him to pay relator the amount

of his said warrants. On the twelfth of May an order issued which was served on the nineteenth, commanding the Treasurer to show cause on the twenty-fifth of May why the mandamus should not issue. On the nineteenth of May Newgass took a rule on plaintiff to show cause why the injunction should not be modified so as to permit the Treasurer to pay his said warrants. On the twenty-second of May the exception filed by the Attorney General on the twenty-seventh of April was tried, and on the twenty-third of May the court sustained it, refusing plaintiff's injunction and discharging the rule *nisi*, also dismissing the intervention of Newgass and refusing the mandamus, and discharging his rule on plaintiff for modification of the injunction. On the twenty-fifth of May Newgass on motion had his application and rule *nisi* for mandamus reinstated on the docket and fixed for the twenty-seventh of May and then for the second of June, on which last day it was taken up and tried. There was judgment final for defendant, ordering and decreeing that the peremptory mandamus prayed for by relator and intervenor be refused and his demand rejected, except that the warrants held by him should be recognized as for necessary expenses of the government.

From this decree Newgass asked for and prosecutes this devolutive appeal.

On the trial in the court below it was shown by relator's attorney that on the ninth of May, 1876, he called on the Treasurer and informed him that he had these warrants, and demanded their payment. The Treasurer replied there were no funds with which to pay them, and that if there were he could not pay them on account of the injunction.

The books and clerks of the treasury show that on the ninth of May there was to credit of the general fund for 1875, \$7149 62, and that it was still there on the day of the trial, second of June, 1876.

It also appeared by said evidence that warrants to an amount much larger than the fund had been presented before Newgass presented his, and left in the hands of the Treasurer for payment out of this fund.

The defendant's counsel urges various objections to relator's pretensions. It is only necessary to notice one of them :

The relator applied to the court for a mandamus to compel the Treasurer to pay his warrants, and the court ordered that the Treasurer show cause why the writ should not issue commanding him to pay them. On trial of this rule the court rejected relator's demand and refused to grant the mandamus. The order to show cause undoubtedly had the effect to prevent the Treasurer paying out the funds to relator's prejudice. But on the trial this order or rule was discharged and set aside and its effects ceased. There was then no order or decree restraining the Treasurer from paying out the funds to other holders of warrants. The only mode of continuing the suspensive effect of the rule was to take a suspensive

The New Orleans Republican Printing Company vs. Dubuclet, Treasurer.

appeal from the decree discharging it. But the relator took only a devolutive appeal, which did not prevent the decree discharging the rule from going into effect, and did not continue to suspend the funds in the hands of the Treasurer. The Treasurer could not plead the pendency of such an appeal as reason for holding the money in his hands pending the appeal. He is not obliged to hold funds unless there is in operation an order so directing. The execution and effect of the decree discharging the rule not being suspended by the appeal, the Treasurer was at liberty to pay out the money. Under these circumstances it would be a vain thing and an injustice to order him to pay to the plain iff what he may have already lawfully and in due course of business paid to others, and what may not now be in his hands.

It is therefore ordered and decreed that the judgment of the lower court be affirmed, and that relator's application for mandamus be refused.

ON APPLICATION FOR REHEARING.

EGAN, J. Suits and matters of litigation must be determined by the condition of things existing when the proceeding is had or petition filed. The court sees no error in the reasons assigned for the decree rendered. Were it otherwise, however, applying the principle just stated to this case, the State Treasurer was enjoined by process and decree of court from paying out any part of the general fund in his hands at the time Newgass applied for the mandamus in this case. Mandamus would not lie to compel the Treasurer to disobey that injunction, and was rightly refused. There is no error in the decree sought to be opened. On this application the rehearing is refused.

No. 6474.

PIERRE LANNES VS. WORKINGMEN'S BANK ET AL.

The purchaser of property, sold for taxes in accordance with the provisions of law, holds, *prima facie*, after the delay for redeeming has expired, a valid title; and such title can not be disregarded, or assailed collaterally, like a simulated title, but must be attacked in a direct action to annul.

A PPEAL from the Superior District Court, parish of Orleans. *Lynch, J.*

H. E. Upton and R. King Cutler, for plaintiff and appellee.

Hornor & Benedict and F. W. Baker, for defendants.

The opinion of the court was delivered by

DEBLANC, J. On the twenty-fourth of January, 1876, defendant filed, in the Superior District Court, a petition in which it alleges that Blaize Lannes is indebted unto it in the sum of two thousand dollars, with

29	112
48	483

29	112
121	14

Lannes vs. Workingmen's Bank.

interest thereon at the rate of eight per cent from the tenth of October, 1873, the payment of which is secured by the vendor's mortgage and privilege on two lots of ground, Nos. 5 and 6, of square No. 4, situated in the Sixth District of the city of New Orleans, bounded by Levee, Jersey, Milan, and Marengo streets.

The amount sued upon is represented by four notes, of each five hundred dollars, bearing interest at the rate and from the date aforesaid, drawn by Blaize Lannes to his own order and by him indorsed, payable respectively at one, two, three, and four years from the tenth of October, 1873, and now held by said bank.

In its petition of the twenty-fourth of January, 1876, defendant prayed for the seizure and sale of the two lots subject to said vendor's mortgage and privilege, to satisfy, in principal and interest, the four notes hereinbefore mentioned, and, besides, five per cent attorney's fees, three dollars and a half for a copy, and one dollar for a certificate, and the costs of suit. On the twenty-fourth of January, 1876, the order then prayed for was granted.

The notes held by defendant were delivered by Blaize Lannes to his brother Martin, a part of the price of a sale from Martin to Blaize of lots Nos. 5 and 6, in square No. 4. In said act of sale it is expressly stipulated that the vendor's mortgage and privilege is retained in favor of any future holder of the notes subscribed for said price, and that Blaize, the purchaser, would not sell, alienate, or encumber the property to the detriment of said act.

On the thirty-first of January, 1876, acting under the writ of seizure and sale granted on the twenty-fourth of that month, the sheriff of the parish of Orleans seized and advertised for sale the mortgaged property. On the first of March, 1876, the plaintiff, Pierre Lannes, a brother of Blaize and Martin, enjoined the bank and E. Waggaman, then sheriff of the parish of Orleans, from selling said property, on the ground that he owns and possesses the same, by virtue of two valid and recorded deeds, one from the tax collector of the Sixth District of the city of New Orleans, the other from the State of Louisiana.

In answer to plaintiff's injunction, the bank, after a general denial, specially denies the validity of the title acquired from the State Collector, and confirmed by the Auditor. It alleges that said sale is null and void, not only on account of the want of authority in the collector to make or give such a title, but also because said property did not belong, when sold by that officer, to the person in whose name it was assessed.

In addition to these averments, the bank charges that none of the formalities prescribed by law for the validity of a tax sale were complied with, and that the sale from the tax collector to Pierre Lannes was

effected by collusion and fraud between said Pierre and his brother Blaize for the purpose of defeating the mortgage and privilege resting on said property.

The bank prays that the tax collector's sale be annulled, plaintiff's injunction dissolved, and he and the surety on his bond condemned *in solido* to pay twenty per cent on the amount of the execution enjoined, and, as special damages, the sum of five hundred dollars.

On the trial, plaintiff offered in evidence, first, the tax deed from the collector to him, executed on the fourth and recorded on the twelfth of August, 1875; second, the sale to him from the State of Louisiana, passed on the fourteenth and recorded on the fifteenth of February, 1876.

The deed from the collector recites that said property was seized and sold to satisfy the taxes thereon due for the year 1873, and adjudicated to Pierre Lannes for \$110, on condition that it could be redeemed within six months from the day on which it was sold, by the owner, or any creditor of the owner. The deed from the Auditor is the confirmation and ratification, in the name of the State of Louisiana, of the title transferred by the collector.

Defendant offered in evidence in its proceedings against Blaize Lannes the order and writ of seizure and sale, the return of the sheriff thereon, the notes delivered by said Blaize, and a copy of the act of sale from his brother to him. That act contains the clause which, by tradition, we have been accustomed to consider as the pact *de non alienando*.

The bank also attempted to sustain the averments in its answer by extracts, documents, the testimony of the Lanneses and other witnesses; but plaintiff's counsel objected to the introduction of that evidence, on the ground that, in this controversy, it was irrelevant and inadmissible; that plaintiff owns and possesses under a title derived from the State, and the validity of his title can be inquired into but by a direct action.

The objections raised were maintained by the court, plaintiff's injunction perpetuated, and defendant's right to a direct action specially reserved.

From that decree the bank has appealed.

Had we found, in defendant's pleadings, the charge that the mortgaged lots, though bought by Pierre Lannes, were bought for Blaize, and paid for with funds advanced by him; that the adjudication to Pierre was intended and concocted, not to displace or change the title, but to defeat the mortgage, and that, as between the two brothers, the transaction was and remains a simulation, we would not have hesitated to open the door to the rejected evidence, and assist the creditor in ferreting out any alleged simulation.

The taxes of 1873 were due by Blaize. The payment of these taxes was secured by a right bearing on the mortgaged property, a right superior in rank to any mortgage and privilege. To satisfy that right and those taxes, the property was seized, advertised for sale, adjudicated to plaintiff. He paid the price of adjudication; he paid that price to a State officer; that officer gave him a title to the property; that title was confirmed by the Auditor. That is not disputed. The deeds of sale from the collector and the State are before us, and the constitution and the law command that such deeds shall be recorded, held, and recognized as *prima facie* evidence of a valid title.

We are in presence of an act which may be fraudulent, which may be annulled, but which can not be treated as an absolute nullity. With one exception, the authorities relied upon by defendant's counsel refer—not to any contract or transaction which, though fraudulent, is not without consideration—but to those contracts which have no existence, and which are mere masks used by dishonest debtors to conceal their fraud. In this case there was a consideration, a price was paid, and if any fraud was planned and perpetrated, it was not between the vendor and the vendee, but between the vendee and the former owner.

The only apparent exception to the general rule, that no relative nullities can be inquired into collaterally, that no actual sales can be annulled but in a direct action and contradictorily with all the parties, is that made in the case of Dupré vs. Thompson, reported in the twenty-fifth Annual, page 504, and which is different in more than one respect from the present one. In that case, Mr. Justice Howell, with a majority of the court, held, too broadly, we conceive, that the validity of a tax sale can be raised by the plaintiff in execution, with no one else but said plaintiff and the purchaser as parties to the proceeding. The tax sale which, then, the court had under consideration, was one made prior to the constitution of 1868, when the deed from the collector was insufficient to establish title, and in fact was not complete unless accompanied by proof of the existence and legality of the assessment. Besides, in that exceptional case, the owner had, within the delay fixed by law, offered to redeem the property, which had not passed from his possession. In this one, no attempt to redeem was made by either the owner or the creditor, and the delay within which that right could have been exercised has expired.

Mr. Justice Wyly did not concur in the views expressed by his associates, and his dissenting opinion is but an additional link in the unbroken chain of more than fifty decisions rendered by our court. He said: "Until the tax sale is set aside in a revocatory action, contradictorily with all parties in interest, the creditor can not proceed to enforce his mortgage, because, whether he has a mortgage or not still existing on the property depends upon the result of the inquiry whether the

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sale to enforce the superior debt, the tax, was formal and valid. Until this result is ascertained in a proper proceeding the formalities necessary in a tax sale are presumed to have been observed by the officers of the State and the sale presumed to be valid.

"Like every forced alienation, a tax sale is liable to be avoided for relative nullities; but I have yet to learn that the form of proceeding to ascertain these nullities is different in a tax suit from that in a judicial sale. Both kinds of sales are made upon the faith of the State. They are not snares laid to entrap honest bidders. The title given by the State, like that acquired at a judicial sale, is presumed to be valid until the contrary is shown in a legal manner.

"It is only simulated sales that may be disregarded; actual contracts, though in fraud of creditors, must be attacked in a direct action."

23 An. 44, 331; 13 An. 155; 14 An. 560, 495; 17 L. 517; 6 R. 21, 152; 6 L. 268; 9 L. 542; 4 An. 439; 3 L. 476; 1 An. 297; 4 L. 473; 8 L. 423; 1 L. 491; 11 L. 438; 6 M. 418, 574; 1 N. S. 537, 633; 23 An. 175; 24 An. 224; 25 An. 236.

There is no error in the judgment of the lower court.

It is therefore ordered, adjudged, and decreed that said judgment be and it is hereby affirmed at the costs of defendant in both courts.

No. 6547.

J. U. AND H. M. PAYNE & CO. VS. OCTAVIA PAVEY AND HUSBAND.

The failure of a recorder of mortgages to record a deed of sale of property, which deed has been deposited for registry with him by the *bona fide* purchaser of the property, can not in anywise operate to the prejudice of the rights of such purchaser, as owner of the property.

APPEAL from the Seventh Judicial District Court, parish of Avoyelles.
Hewes, J.

Irion & Thorp, for plaintiffs and appellants.

Thomas Overton, for defendant.

The opinion of the court was delivered by

EGAN, J. This is an hypothecary action to enforce against certain lands in the possession of defendants a judicial mortgage resulting from the registry on the twenty-seventh of October, 1874, of a judgment obtained by plaintiffs against the vendor of defendant, Mrs. Octavia Pavey, born Cuvillier.

It appears from the evidence that the defendant purchased the property by public act on the eighteenth of January, 1872, and that the act was regularly deposited for record in the recorder's office of the parish of Avoyelles, in which the land lies, on the eighth of February, 1872, was

indorsed and filed the same day by F. W. Masters, recorder, who was a witness on the trial of this case, and swore that the indorsement was correct and that the act was deposited and filed in his office on the day named in the indorsement. It further appears from the evidence that the defendant went into possession at the time of sale, January, 1872, of the land conveyed, and has continued to possess and live upon it ever since, but that the act of sale, though deposited and filed for record according to law, on the eighth of February, 1872, was not actually recorded or transcribed on the books of the recorder's office until the eighteenth of September, 1876, some time subsequent to the registry of plaintiffs' judgment against defendant's vendor. The question raised in this case is whether under this state of facts the land in the hands of the defendant is subject to the judicial mortgage of plaintiffs against the property of her vendor. We think not. If there was fault, nothing in the evidence shows it to have been that of the defendant, who had no power to make the registry, and who had complied with the law by depositing or causing to be deposited and filed for record the act of sale in the recorder's office of the parish where the land lay long anterior to the obtaining or registering of plaintiffs' judgment. The laws of registry are arbitrary, and often operate constructive notice when there is no actual notice. In other States actual notice supplies the place of registry. This equitable doctrine is held not to prevail in Louisiana. In many cases of much greater hardship than the present, this court has considered itself bound to refuse relief, because "*ita lex scripta est.*" So say we now. The plaintiffs seek in this case to disturb a *bona fide* purchaser who had been in actual possession for several years before the institution of this suit, solely on the ground that though filed for record in the proper office before his judgment the defendant's act of sale had not been actually transcribed on the books of the office. The law-maker has said otherwise. C. C., art. 2264, provides that no notarial act concerning immovable property shall have any effect against third persons until the same shall have been deposited in the office of the parish recorder or register of conveyances of the parish where such immovable property is situated. Article 2254 makes it the duty of the recorder to indorse on the back of each act deposited with him the time at which it was received by him and to record the same without delay in the order in which they were received; and provides further "*that such acts shall have effect against third persons only from the date of their being deposited in the office of the parish recorder;*" while article 2266 provides affirmatively that "*the recording of all contracts, sales, and judgments affecting immovable property shall have effect from the time when the act is deposited in the proper office and indorsed by the proper officer.*" The title of the defendant was so deposited and indorsed, as we have seen,

long prior to either the obtaining or registry of plaintiffs' judgment against her vendor, and must prevail. We have been referred to several cases showing the strictness required in regard to the registry of mortgages. They have no application to the case at bar, and upon that subject we express no opinion. The judgment below was in favor of defendant, Mrs. Octavia Cuvillier, wife of Pavey, and rejected plaintiffs' demand with costs. It was correct, and must be affirmed.

No. 6527.

HALL & LISLE IN LIQUIDATION VS. JAMES L. BELDEN.

The property of a succession can not be sold under a *feri facias* issued on an *ordinary* judgment, even though the judgment has been given to enforce a mortgage, and vendor's lien. The holder of such a judgment must go into the probate court, to enforce his rights.

APPEAL from the Fifteenth Judicial District Court, parish of Terrebonne. *Beattie, J.*

Charles W. DuRoy, for plaintiffs and appellees.

Grover & Harding, for defendant.

The opinion of the court was delivered by

EGAN, J. The plaintiff obtained judgment *via ordinaria* against the defendant, Belden, with recognition of mortgage and vendor's privilege upon a house and lot in the town of Houma, which were seized under *feri facias* and advertised for sale. Meanwhile the defendant in execution died, and his succession was regularly opened. The plaintiffs caused notice of their proceedings to be served upon the representatives of the succession, and thereupon the sheriff offered the property for sale under the *feri facias* and seizure issued and made prior to the death of Belden; and the plaintiffs, in the language of the petition in this proceeding, "bid in the same, but the sheriff refused to adjudicate the property to them because of the registry of an official bond of decedent as treasurer of the school fund for the parish of Terrebonne." Plaintiffs thereupon took this rule upon the sheriff, the administrator of Belden, and H. M. Johnson, parish recorder and also president of the school board, to show cause why the mortgage resulting from the registry of the before-mentioned treasurer's bond should not be canceled and erased so far as it bears on the property upon which they, the plaintiffs, claim their mortgage and vendor's privilege. He further prays for general relief.

Service was accepted by all the defendants, and Johnson alone answered, denying the plaintiffs' right to force an adjudication of the prop-

erty in question by reason of the death of Belden before the sale, averring that the matter belongs to the probate court, and praying that the rule be dismissed.

The mortgage and vendor's privilege were retained in the act of sale of the property, and were recorded according to law on the day of its execution, so that in a proper case the plaintiffs would be entitled to relief. We, however, know of no case, except under special statute, in which the sale of succession property is permitted under *feri facias* issued upon judgment obtained *via ordinaria* against the deceased while the succession is under administration.

The death of the judgment debtor stays all such proceedings for the forced alienation of his property. See *Legendre vs. McDonogh*, 6 N. S. 514. There is an exception where the proceeding is *via executiva*. Resort must be had to the court of probates for the enforcement of ordinary judgments.

If there was no valid or legal sale the plaintiffs were not adjudicatees of the property and could not at the present stage maintain this proceeding to cancel the bond mortgage before sale. The property might bring more than their debt.

The judgment of the court below was correct, and is therefore affirmed with costs.

No. 6301.

STATE VS. JAMES AUGUSTINE ET AL.

29	119
124	664

Where two, or more crimes are involved in a single act, but one indictment will lie.

A PPEAL from the First District Court, parish of Orleans. *Abell, J.*

A. P. Field, Attorney General, for the State.

P. W. Kramer, for defendants and appellants.

The opinion of the court was delivered by

SPENCER, J. The question presented by this appeal is whether, when a party steals a wagon and horse harnessed in it, and is indicted, tried, convicted, and sentenced for the larceny of the wagon alone, he can be afterward prosecuted for the theft of the horse.

The horse and wagon being harnessed together, the taking of them was a single act, and constituted but one fact. We think that under these circumstances there was but one theft. To hold otherwise would be to permit an unlimited number of indictments to be predicated upon one single fact—one taking. If an indictment will lie for horse-stealing, in that a horse was taken, and for grand larceny, in that a wagon was

taken, you might continue and indict for petty larceny of the harness, and so on without limit.

We think that where two or more crimes result from *a single act or fact*, but one indictment will lie.

This seems to be the spirit of our law, which in section 1055 of the Revised Statutes declares, in substance, that *no person tried and acquitted or convicted of one offense can be tried for another or different offense arising from the same state of facts.*

Mr. Wharton in his Criminal Law (paragraph 565) says: "Where the act is separable into two distinct branches, as when a man steals simultaneously two articles, as a horse and saddle together, he may be convicted on separate indictments for each offense." But this rule is held not to apply when the articles stolen belong to the same person. *Idem.* —. We apprehend, moreover, that this rule could, under our statute, only apply when the saddle was not on the horse, but required a *separate act* in its taking—an act which, though contemporary or simultaneous with, was yet "separable" from the act of taking the horse. However this may be, we think the spirit of our law forbids two indictments for different offenses arising out of the *same state of facts.* We therefore think the exception, or plea in bar, to the indictment in this case should have been sustained.

It is therefore ordered, adjudged, and decreed that the judgment and conviction appealed from be annulled and avoided, and it is now ordered and decreed that the indictment in this case be set aside and quashed, and the defendants be not held to answer the same.

No. 6560.

ALEXANDER ANDERSON vs. MARY A. PIKE, TUTRIX.

29 120
107 469

A will by which property is devised to *A.* and at his death to *B.* involves a *substitution*, which avoids the devise in favor of *B.*

No act reprobated by law, can be made valid by anybody's ratification.

APPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *Dewing, J.*

Samuel P. Greves, for plaintiff and appellee.

Thomas P. Dupree, for defendant.

The opinion of the court was delivered by

MANNING, C. J. In 1833 John Anderson died, domiciled in the parish of East Baton Rouge, having made an olographic will, by which he bequeathed his property to his brother and sisters, except that disposed of in the following clause:

"I leave to Phebe, one hundred acres of land known as Taquino Place,

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with all the improvements thereon, and four negroes, viz: Phil, Jeany, Big Louisa, and Long Frank, and one thousand dollars, cash, to be invested in bank stock. At the death of Phebe, said land and negroes and increase to become the property of a yellow boy by the name of Alexander, son of Jeany, and in case of his death, to revert back to my heirs mentioned in the first part of my will."

The legatee, Alexander, seeks in this action to recover the Taquino Place, which is now in the possession of the defendant, whose husband acquired it at sheriff's sale issued upon judgment against J. & H. Perkins, to whom Phebe had sold it in 1845. The recovery is resisted on these grounds —

First—That the will is null as to the donation to Alexander, because it is a *fidei commissum* and substitution.

Second—That at the death of the decedent, the legatee, Alexander, was a slave, and incapable of inheriting or acquiring by donation *mortis causa*.

Third—The legatee is the unacknowledged bastard son of the deceased, and by reason thereof could not receive from him by that donation.

Fourth—That W. S. Pike, whom defendant represents, acquired the land in 1836, and those from whom he holds acquired it in 1845.

Fifth—The prescription of ten years is pleaded.

Substitutions and *fidei commissa* are prohibited. Every disposition by which the heir, legatee, or donee is charged to preserve the thing for, or to return it to, a third person, is null even with regard to the donee, instituted heir, or legatee. Civil Code, article 1507, new number 1520. The following clause in a will has been held to contain a substitution: "I give and bequeath unto my wife the plantation upon which I reside, and the following slaves, etc. I further will that upon the demise of my said wife that the property bequeathed to her return to my brothers and sisters and be equally divided between them." Provost's case, 13 An. 574.

The terms of the will in that case are very similar to the present. The bequest was pronounced a nullity.

In a later case a testator bequeathed to his grandson the residuum of his estate, and in the event of the legatee's death before majority, or without leaving lawful issue, then to his niece. The legatee attained majority, and afterward sold a part of the property thus bequeathed him, and then died without leaving lawful issue. The niece sued for the property. The purchasers pleaded the nullity of the provision of the will under which she claimed, because of its containing a prohibited substitution, and it was so held. Wailes vs. Daniel, 14 An. 578.

The facts of this case and the case at bar are exactly alike.

It is alleged, however, that the nullity of the will *quoad* the donation to Alexander is cured by the ratification of the testator's heirs, who have not sought, and do not seek, to disturb the donation, or question its

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validity. A disposition of property which is reprobated by law is not susceptible of ratification. *Hoggatt vs. Gibbs*, 15 An. 700. *Marcadé* says : La confirmation n'est donc possible que pour les obligations annulables. et non pour celles qui seraient proprement nulles, inexistantes. * * * Cette impossibilité d'une confirmation pour les obligations qui seraient proprement nulles a été nettement reconnue lors des travaux préparatoires, et la volonté du législateur à cet regard ne saurait être douteuse. Explication du Code Napoleon, tome 5, p. 90.

Nor has the Legislature here left this matter in doubt.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court is avoided and reversed ; and that there be judgment in favor of the defendant with costs in both courts.

No. 6529.

EDWARD J. GAY & CO. VS. CRICHLAW & DONELSON ET AL.

Where a creditor, who has bought certain movables from his debtor, by crediting the latter on his account with the price of the movables, instantly resells the property to the debtor, the sale will be valid, as between them, whether, any delivery was made to the creditor, or not.

A PPEAL from the Fifteenth Judicial District Court, parish of Lafourche. *Beattie, J.*

E. W. Blake and Barrow & Pope, for plaintiffs and appellees.

Clay Knobloch and Goode & Winder, for defendants.

The opinion of the court was delivered by

SPENCER, J. The defendants being indebted to plaintiffs in a large sum, sold, transferred, and delivered to them forty-three head of mules for the price and sum of \$7439 21, and on the same day, and it might be said, at the same time and place, the plaintiffs resold to defendants the same mules for the same sum. The plaintiffs paid the price of their purchase by crediting its amount on the debt due them by defendants. When plaintiffs sold the mules back to the defendants, they took a note for the price, specifying the consideration, and had this obligation recorded in the mortgage office. The defendants in selling to plaintiffs made delivery by driving the mules out to a common and there giving plaintiffs possession.

Plaintiffs bring this suit on said obligation, and claim the vender's lien on the mules. The defendants deny "that plaintiffs made any valid sale of mules to them or either of them, or that plaintiffs have any lien or privilege on any mules belonging in whole or in part to either of defendants, and further plead failure of consideration of the note sued on."

There is no doubt that the plaintiffs entered into this transaction for

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the purpose of better securing themselves in the debt due by defendants. We see no reason to doubt the *bona fides* of the transaction. True, they bought the mules with the intention of reselling them at once to the defendants and thereby securing themselves by a vendor's privilege. We see nothing illegal or immoral in this transaction. On the contrary, we think it was a legitimate business arrangement. When not illegal or immoral, a contract is a law between the parties. Three things must concur to make a sale—the thing, the price, and consent. As between the parties no delivery is necessary. Third persons alone can take advantage of its absence. We are not called upon therefore to pass upon the question of delivery. As between the parties a counter letter is the only legal evidence of simulation, and parties will not be heard to gainsay their own deliberate contracts, unless they suggest fraud, error, or lesion. There is no merit in the defense set up; there was ample consideration for the note sued upon.

The judgment of the court below is affirmed with costs in both courts.

No. 6569.

MRS. S. A. CONRAD AND HUSBAND VS. G. LEBLANC, SHERIFF, ET AL.

Where a wife is authorized by the judge, under the act of 1865 (R. S. sections 2433 and 2434), to mortgage her separate property for a certain sum, and for a certain purpose, and she thereupon executes the mortgage for a different sum, and for a purpose in addition to the one recited in the authorization, whoever endeavors to enforce the mortgage must prove *aliunde*, that the debt secured by the mortgage inured to the separate benefit of the wife.

The holder of a negotiable note of a married woman, who has taken it for value, and before maturity, is yet liable to have pleaded against him every defense arising out of the wife's incapacity.

A PPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *Dewing, J.*

E. W. Robertson and Barrow & Pope, for plaintiffs and appellees.

C. D. Farrot and J. & G. W. Burgess, for defendants.

The opinion of the court was delivered by

EGAN, J. This litigation was commenced by executory process by H. P. Kernochan claiming to be the holder before maturity of two negotiable promissory notes of Mrs. S. A. Conrad, wife of Dr. Marshall Pope, secured by mortgage executed by her, with the assistance of her husband, before the parish recorder on the tenth of February, 1873, as is alleged by Kernochan, in accordance with an authorization of the judge of the district court, given under the statute in regard to mortgages of married women, on the eighth of February, 1873. This proceeding was enjoined upon various grounds, most of which it is unnecessary to notice,

29	123
46	1385
99	123
47	562
29	123
49	229
29	123
50	1364
29	123
123	242

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as the plaintiff, by his answer to the petition for injunction, changed his proceeding from *via executiva* to *via ordinaria*. The two cases are therefore, in legal effect, but one, as it is immaterial whether the injunction against executory proceedings is sued out by way of opposition under the Code of Practice or by independent petition. The practice seems to be in such cases to consider the petition for injunction as an answer to the original suit when thus converted into an ordinary one. 4 La. 90 ; 16 La. 109. This disposes of Kernochan's bill of exceptions to the ruling of the court below which treated him as plaintiff in the introduction of evidence on the trial. First, as to the position of Kernochan as indorsee before maturity of the notes sued on. In Sprigg vs. Bossier, 5 N. S. 56, it was held that when the objection arises from the incapacity of a party to enter into the contract evidenced by promissory note, that which had no binding effect when made can not acquire it by indorsement. In Degallon vs. Mathews, 5 An. 435, the court reaffirms this doctrine in these words: "When the objection arises from the incapacity of the party, as that she was a married woman, the indorsement of a negotiable note gives no additional effect to the obligation." And the fact that its face showed that it was given by a married woman is sufficient notice to any one to put him upon inquiry if the consideration inured to her benefit before discounting it." The distinction taken is well stated by Judge Porter in Sprigg vs. Bossier to be between mere inquiry as to the consideration and that affecting the incapacity of the party to contract." In both the cases cited the note was in the hands of an indorsee, who, under the ordinary rules applicable to commercial paper, would have been held an innocent holder for value before maturity, but the court held that it was not proven that the debt inured to the benefit of the wife, and the plaintiff could not recover. The case of Davidson vs. Stuart, 10 La., is to the same effect. In the 5 An. case before cited the court says: "Where the consideration of a note given by a married woman is not shown to have been employed for her own separate use, for something which the husband was not bound to furnish, she ought not to be held." In Barnes vs. Burbridge, 15 An. 628, a married woman was held not concluded even by a confession of judgment. In Médart vs. Fasnatch, 15 An. 621, where judgment had gone against husband and wife jointly, it was successfully enjoined by her on the ground that the notes sued on were given in fraud of the law and were void as to her, she being sued for her husband, although the defense was not made in the original suit. In Theriot vs. Voorhies, 12 An. 853, it was held to be "the uniform practice of the court to look through all the disguises in which were shown their business dealings, and to protect the wife and her property." So in Bisland vs. Provosty, 14 An. 172. In Erwin vs. McCallop, 5 An. 173, the wife gave her note and mortgage, in which she acknowledged the debt was for her separate use and benefit.

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There was no other proof in the case, and the court held this insufficient to charge her, and that the burden of proof to make her liable was in the plaintiff. See, also, 14 An. 700; 22 An. 457; 23 An. 196; 24 An. 89. The courts have been uniform in not holding the wife liable without proof that the consideration inured to her separate benefit, no matter what the form of the contract or who the holder in the absence of the statutory authorization by the judge; originating with the act of 1855, the provisions of which are continued in the Revised Statutes and Revised Civil Code of 1870. Unless, therefore, there has been a compliance in the case at bar with these provisions, the plaintiff, Kernochan, can not recover against the wife, defendant. To this inquiry, therefore, we address ourselves specially, reserving any expression of opinion as to the effect of the statute when complied with. In Stapleton's case, 24 An. 89, it was held that the authorization *must precede* the contract or the giving of the mortgage, otherwise the ordinary rule prevails, and the authorization does not make proof that the consideration inured to the wife's benefit, nor dispense the creditor or person seeking to enforce it from making such proof *aliunde*. In the case at bar the authorization, it is true, was given on the eighth of February, 1873, and the notes and mortgage on the tenth, two days after, but the inquiry remains, were they given in pursuance of the authorization? The authorization is to contract a loan or debt of six thousand five hundred dollars, and to mortgage her real estate, situated in this parish, or such part thereof as may be necessary, in order to secure said debt, which is to be contracted for the purpose of borrowing money and obtaining supplies to carry on her farming interest in this parish *for the present year*." In the act of mortgage the notes secured by it amount to \$6439 60, and are declared to be given for *past indebtedness* and for advances to be made during the coming season. It is evident, then, that so far as the past indebtedness is concerned, the contract *preceded* the authorization, and is not covered or protected by it because not contracted in pursuance of it (see, again, 24 An. 89). It is further evident that no such authorization was given by the judge as that recited in the act, and as even if some part of the consideration for the notes and mortgage were such as authorized by the judge, the parties have so intermingled it with others, or, as it is called, "*past indebtedness*," that the amount of each is not distinguishable from the notes and mortgage above, and that this proof must be sought *aliunde*. In other words, the whole notes and the whole mortgage stand affected by this uncertainty, and do not of themselves make that "full proof" against the wife which is spoken of in the statute. The plaintiff seems to have thought otherwise, and has not furnished that evidence *aliunde* necessary to charge the wife. The admission in the act of mortgage is insufficient. See 7 N. S. 341; 8 N. S. 692. The view of this case which we have taken

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makes it unnecessary to pass upon the question of homestead, though, to avoid misapprehension in this case, we are not prepared to say that under some circumstances even a married woman may not claim its benefits. As the plaintiff, Kernochan, may be able to supply evidence which he has not furnished in this record sufficient to satisfy us of his right to recover against the defendant, Mrs. Pope, we are unwilling to conclude him by our judgment.

It is therefore ordered, adjudged, and decreed that the judgment of the court below be annulled, avoided, and reversed, and the cause remanded to the court below to be there proceeded with according to law and the opinion. It is further ordered that the seizure, if still existing, be released, and that Kernochan pay the costs of the same and of appeal, the other costs in the case to await judgment.

No. 6572.

E. H. FARRAR VS. STEPHEN DUNCAN.

The principal is bound by any contract made by his agent which is necessary to carry out the objects of the agency: and no confidential limitation of the mandate, can operate to the prejudice of any innocent third person.

A PPEAL from the Thirteenth Judicial District Court, parish of Tensas.
Hough, J.

E. D. White, for plaintiff and appellant.

Drake & Currell, for defendant.

The opinion of the court was delivered by

MANNING, C. J. The plaintiff is a lawyer, and sues for remuneration for professional services rendered the defendant in certain legal proceedings before the court of Tensas parish. The recovery is resisted on the ground that the plaintiff was not employed by the defendant, nor by any one authorized by him.

The defendant owns several plantations in the parish of Tensas. Seven of these plantations had been sold for taxes, and the professional services consisted in rescuing them from impending total loss to the defendant. The suits instituted by plaintiff, and prosecuted to judgment, are in the record as part of the evidence. The plaintiff was successful in these suits. The value of these plantations ranges from forty to seventy-five thousand dollars, those figures expressing the value of the whole thus recovered. The fee charged is twenty-five hundred dollars. Three practicing attorneys say the fee is reasonable.

Mr. Winchester, of Natchez, is the agent and attorney in fact as well as at law, of defendant. He has had charge of the defendant's interests

Farrar vs. Duncan.

for many years. He leases this property, collects the revenues, and in several instances has employed counsel in this State to represent and protect defendant's interests. He has entire control of this property, with power to sue in defendant's name. Both Duncan and his agent Winchester declare there was an understanding between them that the agent was alone to be responsible for fees of counsel employed by him. Plaintiff had no knowledge of this stipulation of defendant with his agent. Winchester was recognized by defendant as his general agent, and was thus held out to the world by him. There is no attempt by the defendant to deny or conceal the fact of this agency; on the contrary, he unhesitatingly avows it, refers to it in his correspondence with plaintiff, and does not inform him that in the event Winchester employed him he must look to the agent for his fees. Defendant thinks that Winchester ought to pay plaintiff for his services, and that he ought not to be required to do so. It will not be denied that a general authority empowers the agent to bind his principal by all acts within the scope of his employment, and the consequence of this authority is, that its exercise by the agent is not affected or limited, as to a party dealing with him, by any private order or direction not known to such party. *Dunlap's Paley's Agency*, section 127. *Arayo vs. Currel*, 1 La. 536. *Bergerot vs. Farish*, 9 Rob. 346. *Forman vs. Walker*, 4 Annual, 409.

It has been held that a power of attorney "to sue or otherwise collect all claims" implies the authority to employ counsel, and one thus employed was adjudged to be entitled to his compensation, notwithstanding the denial of the defendant of any employment by himself. *Morgan vs. Brown*, 12 Annual, 159.

The employment by the agent in this case of plaintiff binds his principal to the payment of a just and reasonable remuneration for his services. We are not prepared to say that the estimate of the value of these services made by the plaintiff himself, and by the witnesses, is exaggerated. Defendant has had the benefit of plaintiff's services, which were laborious and protracted, and required two absences from his home, and involved great responsibility, and resulted in success.

It is admitted in the pleadings that plaintiff has received one hundred and sixty dollars in part of the fee charged by him. The judgment of the lower court was in favor of the defendant.

It is now ordered, adjudged, and decreed that the judgment of the lower court is avoided and reversed, and that plaintiff have and recover of the defendant two thousand three hundred and forty dollars, with five per centum per annum interest from the thirteenth day of March, 1876, and costs of both courts, and that the attachment sued out by plaintiff be maintained and enforced.

No. 6554.

MRS. ADELINA LUCKETT VS. CORA A. CRAIN.

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e113 194

The advertisement of property, seized under executory process, on the very day of the seizure, has no invalidating effect, provided there are thirty days advertisement, and thirty-three clear days intervene between the seizure and the sale. Where the process of the court, in an injunction, does not seem to be seriously abused, special damages need not be imposed.

A PPEAL from the Ninth Judicial District Court, parish of Rapides. Orsborn, J. Trial by jury.

Ryan & White, for plaintiff and appellant.

R. A. Hunter, for defendant.

The opinion of the court was delivered by

SPENCER, J. Defendant obtained an order of seizure and sale against property of plaintiff; after due notice of the order the writ issued, and on fifteenth April, 1876, between twelve and one o'clock, the sheriff seized the property and gave notice thereof to Mrs. Luckett, sale to take place twentieth May, 1876. The sheriff's advertisement of the sale appeared in the Rapides Gazette, the official paper, on the same morning of fifteenth April, 1876. The publisher says the paper was distributed usually between eight and nine o'clock in the morning.

The plaintiff in this suit (defendant in said executory process) enjoins said sale on the grounds—

First—That the evidence on which the process issued was not authentic.

Second—That the advertisement was premature.

Third—That she was entitled to certain credits on the notes.

The first ground seems not to have been insisted upon below or in this court.

The second ground, the prematurity of the advertisement, is, we think, without much if any merit.

It is admitted, in argument, by plaintiff's counsel that the sheriff might advertise immediately after seizure, without waiting the lapse of the three days, provided thirty-three days clear intervened between the day of seizure and day of sale. The law only requires thirty days advertisement. It appears to us that the law has been complied with. The law takes no heed of the parts of a day. The seizure was made on fifteenth April, and the advertisement was published on fifteenth April, and thirty-four days intervened between that day and day of sale. We express no opinion upon the case which would be presented if the advertisement should be published on a day preceding that of the seizure.

The third ground of injunction was sustained, and plaintiff allowed the credits claimed. The evidence as to one of the credits, \$150, paid by Walk, is not very satisfactory; but the case seems to have been tried

Mrs. Adeline Luckett vs. Cora A. Crain.

by an intelligent jury, and we do not feel inclined to disturb the verdict.

The judgment of the court below is, however, clearly erroneous in condemning the plaintiff in injunction to pay the costs. She sustained her injunction to the extent of the credits claimed, and did not therefore owe the costs.

The defendant prayed for damages in the court below, on dissolution of the injunction, and has filed answer in this court, asking that damages be allowed. The notes bear eight per cent interest, and we do not think this case discloses such an abuse of the process of the court as to justify the infliction of special damages. We think the jury and court below properly disallowed them.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be reversed and set aside; and it is now ordered, adjudged, and decreed that the injunction sued out by plaintiff be perpetuated to the extent of the credits allowed by the jury, to wit: \$165 (being credits additional to those indorsed on the notes), and that for the balance of the debt the injunction be dissolved and set aside; and it is further ordered that the defendant in this suit pay costs of both courts.

No. 5159.

CHARLES T. HOWARD VS. WILLIAM B. SCHMIDT.

A creditor can not annul a judicial sale of his debtor's property, (made at the instance of another creditor) on account of any informality in the proceedings affecting the sale, unless he proves that such informality has caused him an injury.

By appointing an appraiser, the debtor cures any defect in the advertisement of a judicial sale.

Where a party sells one of a series of notes, secured by mortgage on certain property, without warranty, and reserving to any holder of any other of said notes equal rights, it will not debar him from subsequently proceeding on another of said notes, and subjecting said property to the ratable satisfaction of each of said notes.

A litigant is required to give parties in interest no other notice of his proceeding, than that prescribed by law.

A PPEAL from the Fifth District Court for the parish of Orleans.
A Cullom, J.

Joseph P. Hornor, for plaintiff and appellee.

H. J. & J. H. Grover, for defendant.

The opinion of the court was delivered by

DEBLANC, J. This suit was filed by plaintiff on the tenth of November, 1873. He alleges that Mrs. Mary Jane Borden and William B. Schmidt are, *in solido*, indebted unto him in the sum of four thousand dollars, with interest thereon at the rate of eight per cent, from the seventeenth of March, 1871, costs of protest, and attorney's fees.

As concerns Mrs. Borden, plaintiff's claim is predicated on a promissory note drawn to her own order, at the aforesaid date, by her indorsed and delivered to Schmidt as part of the purchase price of a lot of ground and the residence thereon, by him sold to the said Mrs. Borden, for sixteen thousand dollars, payable one-fourth cash, and the balance in three notes of each four thousand dollars, with interest from date.

The first of said notes matured on the seventeenth of March, 1872, was protested, and sued upon by Schmidt. Mrs. Borden filed no answer to that suit, and, on the twenty-fourth of April, 1872, a judgment by default was entered against her. Three days after that default, by act passed before Andrew Hero, Jr., a notary public, defendant, Schmidt, transferred to plaintiff the note sued upon, the mortgage and privilege securing its payment, and his right of action in the suit filed by him against Mrs. Borden.

That transfer and subrogation was made "without any warranty whatever, and with the distinct understanding that said transfer and subrogation are not to impair or prejudice the rights under the second and third notes, or any holder thereof, or of either of said holders."

This clause derives considerable importance from the fact that, by its clear and imperative terms, Charles T. Howard was informed that the note then transferred to him was the first of a series of three notes drawn by the same party, secured by the same mortgage and privilege, and that it was so transferred without any warranty, and with the express stipulation that *any* holder of its twin sisters—not excluding, but including the assignor, at least by inference—would share equally with him in any future distribution of the proceeds of any sale which might be made of the mortgaged property.

As to third parties, that declaration was entirely useless; their right of preference, as against the assignor, would have existed without that declaration. Is it less, in substance and in terms, than an absolute reservation in favor of the assignor, one imposed and exacted by him, the object of which could hardly have been misunderstood by the assignee—one found in his own contract, which bears his signature, and which, either willingly, carelessly, or through necessity, he has accepted and assented to? That conclusion is irresistible. 2 R. R. 221; 21 An. 529, 624.

The second note matured on the seventeenth of March, 1873, and shared the fate of the first—it was not paid—and Schmidt proceeded thereon *via executiva*. The property subject to his vendor's mortgage and privilege was seized, advertised for sale, and sold by the sheriff on the twenty-eighth of May, 1873, under an appraisement partly made by an expert selected by Mrs. Borden herself.

At that sale Schmidt became the adjudicatee of the property for eight thousand dollars.

Howard vs. Schmidt.

Paid the costs and taxes then due, and amounting to.....	\$1757 40
And retained the balance of the price, to be applied as follows, to wit: To State and city taxes already levied but not then exigible	270 00
To the notes held by Charles T. Howard, the New Orleans, Mu- tual Insurance Company, and the said Schmidt, each \$1990 86½, in all.....	5972 60
Total	\$8000 00

This application and proposed distribution of the proceeds of the sale were made, and appear in the sheriff's return on the writ, and they have been approved by all the interested parties except Mrs. Borden and Charles T. Howard.

On the thirteenth of October, 1873, with a view of perfecting the title by him acquired at the sheriff's sale, Schmidt published a monition, to the granting of which, on the tenth and eleventh of November, 1873, the plaintiff and Mrs. Borden objected, and mostly on the identical grounds now urged in this suit and by plaintiff against Mrs. Borden and Schmidt. In that opposition they pray that the sale from the sheriff to Schmidt be avoided and annulled.

On the day he filed his opposition to the confirmation of the aforesaid sale, Charles T. Howard brought a direct action against Schmidt and Mrs. Borden, in which he charges that, on the fifteenth of April, 1873, without notice to him, and without his knowledge, Schmidt proceeded on the second of the notes subscribed by Mrs. Borden; that, in his proceeding, he represented that the third of said notes remained unpaid, and prayed that the property mortgaged to secure the balance due of the purchase price of said property be sold on the following conditions: for cash to satisfy the two matured notes, and, as to the third note, on a term corresponding with its maturity.

He complains that the writ of seizure and sale applied for and obtained by defendant was issued on terms which are at variance with the order of the court, and different from those fixed in said order, in this: that, according to said writ, the purchaser was to assume payment of the third and last of said notes, and pay on the spot the balance of the price of adjudication; that Schmidt fraudulently concealed from him his intention to proceed, for the purpose of acquiring said property for less than he (Howard) would have given for it, and that, by his fraudulent course, said Schmidt has made himself liable *in solido* with Mrs. Borden for the amount of the note he holds.

There are, then, pending at this very hour, in this and the Fifth District Court, two proceedings filed by Charles T. Howard, one in which he prays for the annulling of the sale from the sheriff to Schmidt, and another in

which he claims that, by reason of his purchase, Schmidt has assumed payment of the note which he transferred without any warranty. These pleas are inconsistent, as the former impugns and denies, the latter acknowledges and ratifies the title from the sheriff to Schmidt.

There are—not in Schmidt's petition against Mrs. Borden for a seizure and sale, not in the order of the court on that petition, but in the writ issued by the clerk and the advertisement published in the official paper—two slight errors, not calculated to in any way discourage bidders; one is, that the purchaser has to pay in cash the two, instead of one of the matured notes—that held by the seizing creditor—the other, that the purchaser was to assume payment of the third note, which meant that the purchaser would be bound to pay cash the amount of the note of the seizing creditor, that of Howard on demand, the third one at its maturity; but the purchaser would have had thus to pay and assume payment only in case the price offered would have been sufficient to satisfy the whole claim.

The rule that in judicial sales the prescribed formalities are to be strictly observed is rather for the benefit of the debtor and purchaser than the creditor. By the appointment of an appraiser the debtor waives any defect in the advertisement. This Mrs. Borden has done. As to Howard, he has not shown any injury to him which resulted from the alleged informality, and until he does the rule is inflexible, he can not annul the sale of his debtor's property. 11 R. R. 533; 5 An. 570; 9 An. 632.

Under the subrogation from defendant to him, plaintiff did not acquire; he renounced his right of action against defendant. When and how, if at all, did that right accrue? From, he conceives, the sale of the sheriff, and particularly because Schmidt fraudulently, he says, acquired for a price ridiculously low the property for which, in his petition, plaintiff alleges he would have given more than Schmidt, and, in his evidence, for which he might have gone to ten thousand dollars.

What is the nature of plaintiff's action? It is not a third opposition, not an action in nullity, and, though it has some of its features, it is not the hypothecary action. As regards Schmidt, it is not and can not be an action on the note. If we except from plaintiff's pleadings two sentences, two allegations, one which precedes and the other contained in the prayer, his action against Schmidt would be one in damages, based on pretended frauds. Those two sentences are, that in which he charges that, by reason of his purchase, defendant has assumed payment of his note, and that in which he asks for the recognition of his mortgage and privilege.

Defendant is evidently liable to plaintiff for a share of the proceeds of the sale of the twenty-eighth of May, 1873; that share has been established and informally tendered to plaintiff, who refused it, remarking that he intended to try and get all of it. Has he, against Schmidt, and under

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the circumstances related, an action to recover more than he was offered? If he has, it is not under either the subrogation or the note. He so acknowledged himself, for when asked whether Schmidt was liable for the whole of the note, on account of the frauds he complained of, he answered, "That is one reason." "Any other," inquired defendant's counsel? "No," replied plaintiff.

The charge that defendant intended to defraud plaintiff is not sustained by the evidence; not even by the latter's unsworn allegations, and it is repelled by the very acts with which he is reproached, and by every presumption that can be legally invoked. He applied to a court of justice; from that court he obtained an order to which he was entitled, which no judge could have refused to grant. Under that order a writ was issued, placed in the hands of a public officer, a seizure was effected by that officer, the sale of the seized property was advertised in the official journal, and made at the usual place. Howsoever intimate the relations of interested parties may be, the law requires no other notice than that which was given. Besides, when was defendant himself informed that the sale was to be made? On the day which preceded that sale. To his attorney, who had imparted that information, he said, "I am glad that you sent me that note, as otherwise I would have forgotten the property was to be sold." That remark does certainly not suggest the intention of perpetrating a fraud.

Plaintiff, in this matter, has a right; but is he pursuing the right he has and which, at first, was not denied, but recognized, by defendant? We believe not. His interest is imperiled, not by his or his adversary's fault, but by those fatal causes which have so reduced the value of property in our State, and in his anxiety and trouble he abandons that which he can justly claim, to claim that which can not be justly granted. Under two of the allegations of his petition we can fix his proportion in the proceeds of the sale made in May, 1873; under his evidence we could allow but damages.

The exception that plaintiff's pleadings disclose no cause of action has added to the difficulties of this branch of the controversy, and, but for the two allegations already cited, would have been maintained. We conclude that, in the interest of all the parties, the door should not be left open to any additional litigation between them. Plaintiff is entitled to the amount which was tendered to him. That amount is secured by the vendor's mortgage and privilege on the property purchased by defendant. 5 An. 306; 16 L. 170.

Plaintiff has referred us to the case of Ventress against his creditors, in which this court correctly decided "that when the holder of a claim secured by mortgage assigns a part of it, he can not be permitted to come in competition with his assignee, if the property mortgaged is

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insufficient to pay the whole claim." 20 An. 359. Here we have the parties' contract, which expressly reserves in favor of any holder, whomsoever he may be, an equality of rights with Charles T. Howard, the assignee. That contract is their law. Under its sweeping terms no holder can be excluded; they are each entitled to an equal share of the proceeds of the sale.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court against William B. Schmidt be and it is hereby annulled, avoided, and reversed, and, proceeding to render such judgment as should have been rendered below, it is ordered, adjudged, and decreed that Charles T. Howard recover of William B. Schmidt the sum of \$1990 86½, and that the vendor's mortgage and privilege, by which the payment of said amount is secured, be and they are hereby recognized as having taken effect and bearing since the twenty-second day of March, 1871, on the property purchased by said Schmidt on the twenty-eighth of May, 1873, at the sale then made of the same by the civil sheriff of the parish of Orleans.

It is lastly ordered, adjudged, and decreed that the costs of the lower court be paid by defendant, Schmidt, those of the appeal by Charles T. Howard.

No. 4847.

JACOB HAWKINS VS. NEW ORLEANS PRINTING AND PUBLISHING COMPANY.

Where special defenses have been set up in an answer, in conjunction with the plea of the general issue, evidence is admissible to establish the special defenses. In an action for damages for slander, libel, or defamation, the defendant may plead the truth of what he has said, or written, and prove it by any legal evidence. Where "perjury" has been charged in an alleged libel, it is for the jury to determine, by a scrutiny of the whole publication, whether the word was used by defendant in a popular sense, or as charging the technical crime of perjury. The bribery of a juror is good ground for granting a new trial, and it may be proved like any other fact.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J.* Trial by jury.

H. C. Dibble, Cotton & Lery, and Rice & Whitaker, for plaintiff and appellee.

H. N. Ogden and Randolph, Singleton & Browne, for defendants.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

TALIAFERRO, J. The grounds on which the appellee mainly relies in support of his motion to dismiss the appeal in this case are that the transcript does not contain a true record of the proceedings had on the

29	134
110	609
110	616
29	134
123	52

Hawkins vs. New Orleans Printing and Publishing Company.

trial of the case in the court below, but on the contrary that it is erased, interlined, and mutilated in various places referred to by pages in the transcript; that these defects in the transcript are imputable solely to the appellant.

An attentive examination of the parts of the record containing these alleged erasures, interlineations, and mutilations does not convince us that the transcript is not a true and correct copy of the original record of the proceedings had in the case on its trial in the court below. Two certificates of the clerk and his affidavit besides attest its correctness. It seems that *ex industria* the clerk has aimed to present an exact *fac simile*, a photograph, of the record, which in some of its parts presents, on that account, an anomalous appearance.

And we will here remark that the clerk, in making out the transcript in this manner, has made a departure from the established usage which has nothing to commend it as an improvement and nothing to render its adoption desirable. We, however, assume that this transcript represents correctly the alterations, erasures, interlineations, etc., as they appear in the original. There is nothing that we find to induce the belief that the original record has been altered, or that the transcript is not a correct copy of it.

It is therefore ordered that the motion to dismiss be overruled.

ON THE MERITS.

The opinion of the court was delivered by

MANNING, C. J. In this suit the plaintiff seeks to recover one hundred thousand dollars as damages for an alleged libel, published by the defendant in the Daily Picayune newspaper. An article styled "the Usurper Hawkins" contains the alleged libelous matter. It was published on the twenty-third of February, 1873. So much of it as is necessary for the decision of the issues now before us is here transcribed:

"Jacob Hawkins is not a legal judge, nor is the so-called Superior District Court, over which he assumes to preside, a legal court. The investigation before the Senate Committee on Privileges and Elections has brought to the knowledge of the whole people of the United States what was before perfectly well known to the people of this State. All the members of that committee, in their preliminary report, agreed with remarkable unanimity that the Kellogg government was simply a usurpation without foundation in law. They unanimously declared that the Lynch Returning Board never had the official returns of the election before them, and never had any legal or competent evidence before them to enable them to declare what the results of that election were."

The words particularly complained of as injurious to plaintiff are:

"But why do our people, with these two reports before them, continue to endure that monstrous party creation, the Superior District Court? How much longer will they quietly submit to the decrees of a bastard judge of a bastard court created by a bastard Legislature? Have they any respect for that compound of perfidy and perjury, Jacob Hawkins, who assumes to preside over the court that was specially created to reward him for violating his duty and his oath as a returning officer? How much longer will the members of our bar continue to recognize this illegal tribunal and its perjured judge?"

The defendant pleaded the general issue in the usual form, by denying "all and singular the allegations of the petitioner, except in so far as they may be hereinafter admitted," and then specially justified with ample averments. Some of these are that the article was written and published under a profound sense of duty to the public; that the matters therein charged were universally believed to be true in this community; that in printing and publishing the article respondent was not originating, nor was he giving currency to a rumor, but merely as a public journal narrating facts already well known and accepted as true by the public; that the whole subject-matter had been submitted to a committee of the United States Senate, and that committee had, after a full investigation, found in substance the facts to be as stated in said article; that it was apparent upon the face of the article that it was not intended to produce any new impression upon the public mind as to the character of the plaintiff, but undertook merely to narrate what had already been accepted by the public as true, and upon those accepted truths to advise the public as to its duty at a critical period in the history of the State; and, finally, that every statement contained in the article was supported by the strongest proof, and believed by respondent to be true as published, and that the statements as published were true.

The issues were submitted to a jury, who awarded eighteen thousand dollars to the plaintiff as damages. From the judgment of the court, in accordance with that verdict, the defendant appeals.

There are twenty-two bills of exception to the ruling of the judge below. We shall notice as many of them as may be required at this time.

The defendant offered several witnesses to prove the truth of the statements made in the published article, and objection was made to the reception of this proof on the ground that by pleading the general denial the defendant had lost the right to justify, or, in other words, that the plea of the general issue precluded the plea of justification and any other defense. It has long been a settled rule under our Code of Practice that the general issue is waived by a special plea, and that the latter always controls the former so far as relates to the matter specially

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pleaded. *Lesseps vs. Wicks*, 12 An. 739. When there is a special defense relied on, the answer always opens with the plea of general denial, and is followed by the special pleas more or less elaborated, as it usually closes with the prayer for general relief, and it would not be more extraordinary to hold that the prayer for general relief excludes all other prayers of the answer, than that the plea of the general issue once made, accompanied by special defenses, excludes all evidence in support of those defenses. The *gravamen* of plaintiff's complaint is, not that defendant made a publication concerning him, but that the publication thus made was false, malicious, and libelous. The defendant averred that it was not false, but true, not malicious, but made with good intent, not libelous, but the reiteration of what was commonly believed to be true. He should have been allowed to substantiate these averments.

In support of the averment relative to the conclusions of the United States Senate committee, the defendant offered in evidence the published report of that committee. One of the statements in the publication in the *Picayune* related to the participation of the plaintiff in the acts of the Returning Board of that date as one of its members. The alleged libel as to that participation, and the nature and quality of the plaintiff's conduct as a sworn member of that board, was justified in the answer as founded upon that report, and the evidence was offered to show that the publication was free from malice, and was only a reproduction of what that committee had upon examination pronounced to be true. In that light, and for that purpose, the evidence should have been received.

So, also, of the rejection of the various witnesses who were offered to sustain different phases of the plea of justification. Whatever was pertinent under that plea, and in its support, should have been received. By express law, the defendant in a civil suit for slander, defamation, or for a libel may plead in justification the truth of the slanderous, defamatory, or libelous words, and may maintain that plea by all legal evidence. R. S. 1870, sec. 3640.

The plaintiff insisted that the expression "compound of perfdy and perjury" as applied to himself must be held to mean that he had been guilty of the technical crime of perjury, and that no evidence could be received except that which would show him to have been guilty of that crime, as defined in the statutes. The modern doctrine upon that subject is that the question to be left to the jury is not what the defendant meant by the words he spoke, but what reasonable men hearing the words would understand by them. *Townsend on Slander and Libel*, 173, note. To call a man a thief is not actionable unless it is intended to impute to him a felony; unexplained, it will be construed in a feloni-

ous sense, but is subject to explanation by the context. *Idem.* 197. The jury should have been instructed to take the publication in its entirety, and to consider from its phraseology whether it was the technical crime of perjury or the popular sense of that word that was meant, or that was or would be understood by readers as having been meant by the utterer of the alleged libel. *Trimble vs. Moore*, 2 La. 577; *Miller vs. Holstein*, 16 La. 395.

The defendant offered the plaintiff as a witness, and was proceeding to interrogate him, when objection was made that he could only be interrogated on facts and articles. Formerly a party to a suit could only be interrogated by questions in writing annexed to a petition or answer in which one of the parties to the suit prays that the other be ordered to respond under oath, in order to make use of his answers as testimony in support of his demand, or to aid him in his defense. Code of Practice, article 347 *et seq.* In 1868 the competent witness in all civil matters was declared to be a person of proper understanding (Acts of 1868, p. 269), and since that act parties to suits have been uniformly held to be competent witnesses either in their own behalf or in behalf of their adversaries. The only exception to this uniform ruling that we know of is that of the court *a qua* on the trial below.

Many witnesses were offered to prove the truth of the alleged libelous matter, and, among them, James Longstreet. The bill of exception in this instance states that the object of the testimony was to rebut the presumption of malice, but the court held it inadmissible, because "under the general issue defendant can not prove his charges." The exclusion of most of the testimony of defendant rested upon the ruling first made as to the effect of pleading the general issue, the judge having ignored the special pleas made in the same answer, and to which the pleader specifically referred as limiting the general denial. It is only when the defendant confines himself to that plea, and altogether omits that of justification, that evidence of the truth of the alleged libelous matter is excluded. *Miller vs. Roy*, 10 An. 231. The error of the first ruling entailed the errors of all subsequent ones, and thus totally deprived the defendant upon any hearing upon the merits of his defense.

The case was given to the jury on Friday, June 19, and at six o'clock p. m. of that day, on being brought into court at their request, the foreman reported their inability to agree, whereupon the court ordered the sheriff to remand them to their room, there to remain under his charge until they do agree. At three o'clock p. m. of the ensuing day they were again brought into court, and their foreman made the same report, and the same order was made by the judge. At nine o'clock p. m. of that day the verdict was rendered.

A motion for a new trial was made on the ground that two jurors had

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been bribed—one of them, by name Haworth, before the cause was submitted, and the other, D'Aquin, on the afternoon of Saturday after they had been for a few moments in court to announce their non-agreement. This bribery was alleged to be by the plaintiff through an agent. The crier of the court, George Walker, was the alleged agent. It was sworn that he slipped into D'Aquin's hand a small piece of paper, while the juror with the others was going to their room from the court-room, and whispered to him not to open the paper until he had returned to the jury-room. It was D'Aquin that had said aloud to the judge that an agreement upon a verdict was impossible. The writing upon the slip was:

"Mr. D'Aquin, if you go with the majority there is a five-hundred-dollar note at the store for you.

"YOUR FRIEND ON CHARTRES STREET."

D'Aquin had been during the jury's deliberations a pronounced favorer of a verdict for the defendant, and upon his return to the jury-room on Saturday afternoon the impossibility of agreement, of which he had given assurance to the court, was suddenly converted into a hearty acquiescence in the views of the majority. All the facts of this affidavit are said to have been obtained by the confession of Walker, the crier of the court, as well as of the juror himself.

The other juror was alleged to have been bribed by one Thomas Kavanaugh, acting as agent of plaintiff, during the progress of the trial, twenty-five dollars being paid cash and one hundred and twenty-five dollars more to be paid as the purchase price of a verdict for twenty-five thousand dollars in favor of plaintiff.

Upon the hearing of the motion for a new trial, supported by affidavits setting forth *in extenso* the occasions and circumstances of the bribery, with the names of the parties, additional evidence was offered to sustain the statements made in the motion and the affidavits. Objection was made to its reception for the reason that a juror should not be permitted to impeach his own verdict, and as to the witnesses, other than the jurors, that their statements would be hearsay. The presiding judge was then offered as a witness to prove that Walker, the crier of the court, admitted to him (the judge) that he did slip into the juror's hand the writing offering a specific bribe on the occasion described, and on objection by plaintiff the court ruled out the testimony.

The textual provisions of our Code declare that a new trial shall be granted if it be shown that the jury has been bribed. The applicant for the new trial must annex to his motion his affidavit of the facts alleged in proof of the bribery. Code of Practice, arts. 560, 561; Morgan vs. Bell, 4 Martin, 619; Trehan vs. McManus, 2 La. 216. It has often been held that a juror can not be heard to impeach his own verdict,

because the admission of his testimony to that end would open the door to tamperers, and might be the means to destroy a verdict which could be used by a juror who had become dissatisfied with it. Its effect is to defeat his own solemn act under oath. *Campbell vs. Miller*, 1 N. S. 514; *Cive vs. Rightor*, 11 La. 141; *State vs. Caldwell*, 3 An. 435; *Hilliard on New Trials*, 196. But it has also been held that the testimony of a juror may be received to prove misconduct of the officer having them in charge. *Thomas vs. Chapman*, 45 Barbour (N. Y.) 98. And in the special instances of bribery as the alleged misconduct of the jury, the affidavit of a juror touching that misconduct was held admissible. *Ritchie vs. Walbrooke*, 7 Serj. & Rawle, 458; *Spurck vs. Crook*, 19 Illinois, 426. And this from the necessity of the case. The bribery is known, usually, to none but the party using it, or his agent, and his victim. The fear of detection and its consequences imposes secrecy upon the instruments employed for its accomplishment. Without the power to interrogate them, the exposure of the bribery would, in most instances, be impossible. But we do not find it necessary to decide authoritatively now whether that particular misconduct of a juror, *i. e.*, bribery, can be elicited by his own testimony. In this case the testimony of the crier to the court was offered to prove his own successful attempt to bribe one of the jurors, and, upon ascertaining that the crier had disappeared, the presiding judge was offered to prove the crier's admission that he had slipped the piece of paper in D'Aquin's hand, while the jury were yet undecided, and while the officer was accompanying them to their room for renewed deliberation.

The refusal of the judge to grant a new trial under these circumstances is not merely an error in law. It is official misconduct, and reprehensible in all its phases. It was his duty to have ordered a new trial *ex mero motu*. A judge is the conservator of his court. The conservation of its purity is his first and highest function. It should not require the interposition of counsel, or of any subordinate officer of the court, to move the judge promptly to repair an injury to his own administration of justice, effected by such foul means. The knowledge of the stain on that day and by that act stamped upon his court was brought home to him by protracted and repeated appeals for its removal. His own knowledge of the facts was attempted to be elicited, and, instead of making that knowledge the basis of an instant and voluntary order which should wrest from the briber the fruits of his wrongful act, he permitted the verdict which he knew to have been bought, to tarnish the records until the appeal to a higher tribunal shall have removed the opprobrium thus cast upon the law, and those who administer it.

Nearly four years have passed since the verdict was rendered in this case, and we may reproduce here the indignant expressions of Lord

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Denman, in rendering his celebrated judgment in O'Connell vs. the Queen: "If it is possible that such a practice as that which has taken place in the present instance should be allowed to pass without a remedy, trial by jury, itself, instead of being a security to persons who are accused, will be a delusion, a mockery, and a snare."

It is therefore ordered, adjudged, and decreed that the verdict of the jury be set aside, and the judgment rendered thereon be avoided and reversed, and that this cause be remanded to the lower court to be tried anew under the instructions contained in this opinion; and it is also ordered and decreed that the defendant have and recover of Martha J. Hawkins, the legal representative of the succession of the deceased plaintiff, the costs of this appeal.

No. 6040.

McCloskey, Bigley & Co. vs. Wingfield & Bridges et al.

A judgment against a partnership, which has ceased to exist by the death of one of the partners before the date of the judgment, is null and void.
A surety can not be held under a judgment void as to his principal.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J.*

Bentick Egan, for plaintiffs and appellants.

George L. Bright, for defendants.

The opinion of the court was delivered by

MARR, J. McCloskey, Bigley & Co. brought suit against Wingfield & Bridges, described in the petition as "a commercial firm, composed of James H. Wingfield and H. Q. Bridges." Process of attachment was issued, under which the property of Wingfield & Bridges was seized, and released on bond given by Wingfield & Bridges, with Charles S. Bush as security, conditioned to satisfy such judgment as might be rendered against defendants.

Plaintiffs prayed "that Wingfield & Bridges be cited to appear and answer this petition, and, after due proceedings had, that said firm of Wingfield & Bridges, and the members thereof, James H. Wingfield and H. Q. Bridges, be condemned, *in solido*," etc.

The citation was addressed to "Messrs. Wingfield & Bridges," and the service was on "Messrs. Wingfield & Bridges, through Bridges in person, a member of said firm." The answer was in the name of the firm, and the judgment was against "defendants, Wingfield & Bridges, and the members thereof, James H. Wingfield and H. Q. Bridges, *in solido*."

Execution issued on this judgment, and was returned "no property found," and therefore plaintiff took a rule on Charles S. Bush, the surety

in the release bond, to show cause why he should not be condemned to satisfy the judgment.

In his answer to this rule Bush set up a number of objections. We shall notice but one of them, which we think is fatal, and that is that James H. Wingfield, of the firm of Wingfield & Bridges, was dead at the time the judgment was rendered.

The suit was against the partnership, Wingfield & Bridges; the partnership alone was cited; the release bond was given by the partnership, and Bush was surety for the partnership.

A judgment against a commercial partnership binds the partners *in solido*, but to have that effect the partnership must exist and be capable of standing in judgment at the time the judgment is rendered.

The proof is that James H. Wingfield died on the second of April, 1874, more than a year before the judgment, which was rendered on the twenty-first of May, 1875. The judgment, therefore, against the firm of Wingfield & Bridges, and against James H. Wingfield, was a mere nullity, absolutely void.

The condition of the release bond is that the defendants, the principal obligors, Wingfield & Bridges, shall satisfy such judgment as may be rendered against them. A judgment against one of the individuals who was a member of that firm while it existed is not a judgment against the defendants, the partnership; and the surety did not undertake to satisfy any other judgment than such as might be rendered against the principals, the partnership.

After the death of Wingfield no judgment could be rendered against the partnership without making his representative a party, and until such judgment is rendered the surety of the partnership is not liable.

In *Grieff vs. Kirk*, 17 An., it was decided that the surety of a partnership in an appeal bond was not the surety of the individuals comprising that partnership, and that he was not liable on a judgment which discharged the partnership but condemned one of the partners individually.

The judge of the court below did not err in dismissing the rule taken by plaintiffs on Bush, the security, and the judgment appealed from is affirmed with costs.

ON APPLICATION FOR REHEARING.

The opinion of the court was delivered by

EGAN, J. This application has been earnestly pressed upon our attention, and we have given it due consideration.

The question is not merely as to the manner of enforcing judgment against the principal before pursuing the surety. It is as to the existence of judgment against the principal. The death of a partner dis-

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solves the partnership. R. C. C. 2876. If this arises after answer filed, suit does not abate, but may be continued by making the heirs or legal representatives of the deceased partner parties to the suit. No valid judgment can be obtained otherwise, as held by us. This was not done in the present case, and is an insuperable obstacle to the pursuit of the surety in the present attitude of the case.

The rehearing is refused.

No. 6536.

F. S. GOODE vs. JOHN NELSON ET AL. E. J. GAY, THIRD OPPONENT.

A third opponent who claims a privilege on property seized under a *feri facias*, sets forth his demand in a sufficiently specific manner when he states its nature, the special transaction in which it founds, its exact amount, and the particular property on which he claims a privilege.

A PPEAL from the Fifteenth Judicial District Court, parish of Lafourche. *Beattie, J.*

Goode & Winder, for plaintiff and appellee.

Burrow & Pope, for defendant.

The opinion of the court was delivered by

SPENCER, J. Plaintiff, F. S. Goode, under *feri facias* seized a number of mules as the property of defendants. Gay & Co. filed a third opposition, claiming the proceeds of the sale. Plaintiff excepted to this opposition, on the ground that its allegations were vague and not sufficiently explicit and definite to inform him of the nature of the claim. The court *a qua* sustained this exception and dismissed the opposition, from which decree Gay & Co. appeal. The allegations of Gay & Co. are, in substance, as follows: That there is now pending in said court a suit, No. 1425, wherein they claim of the defendants, John Nelson et al., \$7439 21, and for payment thereof they also claim a vendor's privilege on certain mules therein described and which were then on the Coulon Plantation, as the whole will appear by the record of said suit; of which a certified copy is annexed and made a part hereof. That the sheriff under a writ of *feri facias* issued in the suit of F. S. Goode vs. John Nelson et al. has seized and will sell as the property of said defendants the aforementioned mules, on which your petitioners have the vendor's privilege aforesaid; that petitioners' said privilege was duly recorded and preserved; that Goode was a party consenting to the transaction by which petitioners became owners of said mules, and had full notice of their title to the same; that they are entitled to be paid by preference out of the proceeds of the sale, etc. Wherefore they oppose, etc.

The record of the suit No. 1425 was in the same court and office as the

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pending suit, but no copy was served or filed with it as stated. The plaintiff insists that, not having been filed with this opposition, the allegations of said suit No. 1425 can not be used to supplement the allegations of this opposition. We do not deem it necessary to pass upon this point. We think the allegations of this opposition, the substance of which we have before stated, are in themselves sufficient. The opponents inform the plaintiff and the court that they have a suit pending against the same defendants, wherein they claim a vendor's privilege on certain mules on Coulon Plantation for \$7439 21; that the plaintiff has caused the sheriff to seize these identical mules under a *feri facias* in this suit, and that opponents having a duly-recorded vendor's privilege on these mules are entitled to be paid out of the proceeds of their sale, by preference to plaintiff, and pray for judgment accordingly. The opponents state the nature of their demand, to wit: a vendor's privilege growing out of a transaction of which plaintiff had full notice. They state its amount. They identify the property subject to their alleged privilege, by stating it to be certain mules on a certain plantation, being the same mules seized by plaintiff in this case. We think this is a substantial compliance with the requirements of the Code of Practice. The exception should have been overruled.

It is therefore ordered, adjudged, and decreed that the judgment of the court below be avoided and reversed; and it is now ordered and decreed that the exception filed by plaintiff to the third opposition of E. J. Gay & Co. be overruled, and that this cause be remanded to be proceeded with according to law, plaintiff and appellee paying costs of this appeal.

No. 6571.

AUGUST BOHN, APPLYING FOR A MONITION; J. STANFORD BOSSIER, OPPONENT.

The act of 1869 (Revised Statutes, section 3759) which limits the application of article 132 of the constitution, (providing for the subdivision of land sold at public sales into lots), to sales made *after* the adoption of the constitution of 1868, is constitutional.

A PPEAL from the Sixth Judicial District Court, parish of St. Tammany. *Duncan, J.*

McEnery, Ellis & Ellis, for appellant.

Thompson & Russell, for opponent.

The opinion of the court was delivered by

SPENCER, J. The facts of this case are thus stated by counsel for applicant, and are conceded by counsel for opponent:

On the second of June, 1869, in the suit No. 1150 of the docket of the court *a qua*, entitled Mrs. F. A. Bossier, executrix, vs. J. Stafford Bossier

et al., judgment was rendered against defendant for seventy-three hundred dollars, and directing the seizure and sale of certain land which had been specially mortgaged on the third of November, 1865, to pay and satisfy the same. The defendant in execution formally acquiesced in said judgment and order of sale. A writ of *fieri facias* issued against the defendant (opponent herein) for the sale of said property mortgaged, and of the seizure made thereunder by the sheriff the defendant took notice, and in furtherance of the sale appointed an appraiser, who assisted in appraising the property at fifteen hundred dollars.

On the seventh of August, 1869, after full advertisement, the property was sold by the sheriff, and August Bohn (appellant herein) purchased it for two thousand dollars paid in cash.

On the ninth of May, 1870, said purchaser, A. Bohn, filed the usual petition for a monition. It appears that no publication of the monition was ever made, and that the petition slumbered as filed in the clerk's office, wholly neglected, until November 26, 1875, when said debtor in execution, J. Stanford Bossier, appellee, filed an opposition to it, declaring that the sheriff's sale to Bohn was null, because the land sold was not subdivided into lots, as directed by article 132 of the State constitution, and that therefore he (opponent) was still owner of the land, and he prayed for the nullity of the sheriff's sale to Bohn, and to be restored to the possession of said land.

In May, 1876, a trial was had. The plaintiff, A. Bohn, was neither present nor represented, and the trial was wholly *ex parte*. George H. Penn, Esq., the attorney who filed the petition for the monition, was dead, and plaintiff, residing in New Orleans, was not notified of the trial, nor was he served with any copy of the opposition, or demand of opponent, which prayed for the nullity of the sale of the property, for which he had paid two thousand dollars.

There was judgment sustaining the opposition and annulling the sale to Bohn. From this judgment he prosecutes this appeal.

The evidence in this record, and produced by the opponent himself, shows that the proceedings were regular, and had the monition been published and offered in evidence, we would be bound to homologate the sale. The only objection urged by the opponent to its validity is that the land was not subdivided and sold in lots according to article 132 of the constitution. The act of 1869 (Revised Statutes 3759) providing for carrying into effect said article, expressly provides that the provisions of said act shall not apply to sales made in execution of contracts entered into prior to the adoption of the constitution of 1868. The opponent says this law is unconstitutional. The courts of this State have uniformly given effect to it, and we would hesitate now, at this late day, to declare it unconstitutional, and thus unsettle great numbers of

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titles. 24 An. 215. But we do not think it unconstitutional. Article 132 is of that class of provisions which remain necessarily inoperative until the mode of giving them effect is provided by statute. The Legislature has seen fit to provide such mode only for sales in execution of contracts bearing date subsequent to the adoption of the constitution. This court interprets, but does not make laws, and as long as there is no statute of the State providing for the application of this article to sales under contracts antedating the constitution, this court can not make such application, even if it be conceded the Legislature has such power. The contract sued upon in the case of Bossier, executrix, vs. J. Stanford Bossier, and in execution of which the sale to Bohn was made, bears date the third of November, 1865. It was not, therefore, necessary to the validity of the sale that the property be divided and sold in lots. We think, therefore, that as against the opponent, the sale must be maintained.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed, and it is now ordered and decreed that the opposition of J. Stanford Bossier be rejected, and that this cause be, in other respects, remanded to be proceeded with according to law, appellee paying costs of his opposition in the court below, and costs of this appeal.

No. 6516.

STATE EX REL. N. ST. MARTIN VS. THE POLICE JURY OF THE PARISH OF
ST. CHARLES ET AL.

A mandamus will not lie to compel an officer to do a thing, as to the performance of which he has discretionary power. He can only be compelled by mandamus to perform a duty, when it is purely ministerial. The taxpayers of a parish have a right to appeal from any judgment of court, ordering the police jury to levy and collect a tax, and no acquiescence in the decree by the latter, can affect the former's right of appeal.

A police jury can not be compelled by a mandamus to levy a tax for the payment of a claim which they deny, and which has not been passed on judicially.

A mandamus will not issue, where an adequate remedy can be obtained through the ordinary legal processes.

A PPEAL from the Fourth Judicial District Court, parish of St. Charles. *Flagg, J.*

J. D. Augustin and Julien Michel, for relator and appellee.

Lesassier & Binder and Breaux, Fenner & Hall, for appellants, the taxpayers, and *G. A. Breaux*, for the police jury.

The opinion of the court was delivered by

MANNING, C. J. The relator, alleging that he is the Parish Attorney and District Attorney *pro tempore* of St. Charles parish, and is entitled

to receive \$1789 47 from the police jury thereof as compensation for back salary and perquisites for 1874 and salary and perquisites for 1875, prayed and obtained a mandamus to compel the assessment and collection of a tax sufficient to pay his claim. The writ was directed to the members of the police jury, ordering them to convene, and make an assessment of a tax of two mills on the dollar; to the collector, ordering him forthwith to collect that tax; and to the parish treasurer, ordering him to pay the proceeds to the relator.

The police jury except to relator's petition for this, that his allegations are not sufficient in law to entitle him to the writ of mandamus, and after pleading the general issue, allege that in preparing the tableau of expenditures for 1875 and levying a tax for their payment, the jury exercised discretionary powers which are not the subject of judicial inquiry; that one of the items upon this tableau is three hundred dollars for relator's salary for 1875 and another like sum for his fees in criminal prosecutions, and that there are no other legal expenses of the parish than those included in that tableau, the collection of a tax having already been imposed to pay them, and that the jury have no authority to impose a tax to pay any claim not acknowledged and liquidated, and not included in that tableau, except such tax be levied by virtue of some special legal provision for a special purpose.

The mandamus was made peremptory, and the parish officers proceeded to obey it. Lesassier & Binder, and eleven other taxpayers of that parish, petitioned for an appeal to this court, and their appeal was granted by the court *a qua*, and is now before us.

The appellee moves to dismiss the appeal because the defendants have voluntarily executed the judgment in whole or in part. The appellants are taxpayers of the parish, whose right to the appeal can not be prejudiced by any acquiescence of the officials in the judgment.

The object of the writ in this case is to compel the police jury to assess, levy, and collect a tax sufficient to pay an alleged claim of relator for services which the defendants deny to be due him. They answer that they have provided in their annual budget for the collection of a tax to pay what they admit to be due, and that the list or tableau of expenditures for which they have provided contains every item that they can provide for under the general laws.

The writ of mandamus never issues to officers, charged with a public duty, to do an act where the law vests them with a discretionary power. *Louisiana College vs. State Treasurer*, 2 La. 394. Nor will it be issued where the law affords adequate relief by the ordinary means. Code of Practice, articles 830-31. It was a matter of discretion whether the police jury should pay a claim preferred against the parish before that claim had been adjudicated judicially, and it was a wise discretion to refrain

from paying it if, as in this case, the justice of the claim was denied. Adequate relief by the ordinary process of courts could be afforded the relator, since the police jury was amenable to his suit, if they refused to pay. It is only where a specific ministerial duty is imposed by law on an officer that the writ of mandamus can properly issue against him. *Baldwin vs. Dubuclet*, 27 An. 29. Thus a mayor of a city may be compelled to issue a commission to an officer, if it is made his duty by law to issue it, (*Hubert vs. Auvray*, 6 La. 595) and a recorder of mortgages may be compelled by mandamus to erase mortgages, that being one of his legal duties. *Diggs vs. Prieur*, 11 Rob. 54. and the Auditor may by this process be compelled to warrant on the Treasurer of the State for a sum of money specifically appropriated by the Legislature. *State vs. Bordelon*, 6 An. 68.

In the case at bar there was not a ministerial duty to perform. On the contrary the phraseology of the law defining the duties and powers of police juries, not only imports, but expressly requires the exercise of discretion. The police juries shall have power to make all such regulations as they may deem expedient for their own government, and specifically to lay such taxes as they may judge necessary to defray the expenses of their respective parishes. Revised Statutes 1870, section 2743. This is to be done by preparing and publishing the estimates for the year, and laying the tax necessary to raise the amount, subject to the limitation as to the per centum which the law has imposed.

What are the "ordinary means" by which the relator can have adequate relief? Whenever one, having a claim against a parish, is denied payment, the police jury of that parish can be sued, and if the validity and justice of his claim is recognized by a judgment of a court, the judge who shall render the judgment is required to order the board of assessors of that parish to assess forthwith a tax at a sufficient rate per centum upon the assessment roll of the current year to pay and satisfy the judgment in full. Revised Statutes 1870, sections 2747-9.

Nearly two hundred pages of this record are occupied by testimony, the object of which appears to be to satisfy the court that the police jury ought to pay the relator the sum demanded by him. This of itself precludes the idea that it is a pure ministerial act that the jury was to perform. Certainly it is not such an act as they may be compelled to perform by mandamus.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court is avoided and reversed, and the writ of mandamus granted by that court is rescinded at the costs of the relator in both courts.

No. 6525.

A. HEFNER VS. S. HESSE AND H. VERGEZ.

The sureties on an injunction bond can not be held liable for the amount of the judgment enjoined, unless it be proved that the judgment was lost in consequence of the injunction.

In seizing property under a *feri facias*, encumbered with liens and mortgages, the sheriff should take note of them, and allow for them, in estimating the amount of property he should seize to satisfy his execution.

The sheriff is presumed, as to any official act, to have done his duty, and who alleges that he has made an excessive levy must prove it.

An injunction will not lie on account of an excessive seizure under a *feri facias*.

The amount of the bond given for the release of property seized under execution, is not in the discretion of the court. It is fixed by law at one-half over the estimated value of the property seized. See Revised Statutes, section 3411.

A judgment debtor who neglects to point out property to satisfy the execution against him, after having been duly notified to do so by the sheriff, can not afterward enjoin his creditor from seizing and selling his immovables before exhausting his movable property.

When it appears that an injunction has not been wantonly issued, but that plaintiff has resorted to it under a mistaken but honest belief that he was entitled to do so, only such damages will be allowed on its dissolution as cover the court costs, and counsel fees of defendant.

A PPEAL from the Fifteenth Judicial District Court, parish of Lafourche. *Beattie, J.*

Goode & Winder and J. S. Goode, for plaintiff and appellant.

E. W. Blake and Clay Knobloch, for defendants.

The opinion of the court was delivered by

DEBLANC, J. On the sixth of June, 1873, Augustus Hefner obtained judgment against Simon Hesse and Hector Vergez for \$4977 56, with interest thereon at the rate of eight per cent per annum from the twenty-eighth of December, 1872.

From that judgment a devolutive appeal was taken by said Hesse and Vergez, and on the ninth of November, 1874, the judgment appealed from was confirmed by the Supreme Court.

Under that judgment three writs of *feri facias* issued on the same day—one directed to the sheriff of Assumption, another to the sheriff of Lafourche, and the third to the sheriff of Terrebonne.

To satisfy those writs, each of said sheriffs seized from Hesse and Vergez a plantation, with the growing crops, the mules, implements of husbandry, the sugar, molasses, corn, hay, carts, shingles, and cord wood thereon being.

On the seventeenth of November, 1873, Hesse and Vergez enjoined those seizures.

Their injunction was partly maintained and partly dissolved by the lower court. From the decree of said court Hefner has appealed.

On the nineteenth of November, 1873, in a petition addressed to the district judge, Hesse and Vergez alleged that the property then seized

was worth one hundred thousand dollars, and was far more than sufficient to satisfy their creditor's judgment. They swore to the truth of the facts alleged by them, and prayed:

First—That said seizure be reduced to a reasonable amount.

Second—To be allowed, after the reduction, to retain the property seized by furnishing bond to the sheriff of the parish of Lafourche for such sum as the court would deem just.

Third—That, on said bond being furnished, the sheriffs of Lafourche, Terrebonne, and Assumption be ordered to return into their possession the property held under the three writs.

On the same day, the nineteenth of November, 1873, the district judge ordered "that the property seized be released to defendants on their furnishing bond in accordance with law in the sum of eight thousand dollars."

The bond referred to in that order was furnished—this we learn from the parties' declaration—but, as said bond is not in evidence, we know not to whom and on what condition it was made payable. We can only presume, and we do, that, in form and in substance, it is the bond mentioned in section 3411 of the Revised Statutes.

On the ninth of May, 1874, Hefner filed his first answer to the injunction sued out by Hesse and Vergez, denied their allegations, and prayed that they and the sureties on their injunction bond be condemned *in solido* to pay him twenty per cent on the amount of the enjoined execution, and, besides, two hundred and fifty dollars as special damages for attorney's fees.

On the seventh of June, 1875, Hefner filed a supplemental answer, in which he avers that Hesse and Vergez had then no property left and out of which his claim could be realized; that, by the effects of their injunction, he has lost the whole of his judgment; and that in addition to the damages he claims in his first answer, the said Hesse and Vergez and the sureties on their bond should be condemned to pay him an amount equal to that which he contends he has lost.

The counsel representing Hesse and Vergez excepted to that supplemental answer; but, as they have not urged this exception in this court, we are authorized to believe that they do not rely upon it, and we pass it without further notice.

This is the abridged history of this disastrous case. The pursued debtors are ruined, the pursuing creditor is left with an onerous judgment and his recourse against the sureties on two bonds.

From the printed arguments of the parties' counsel we conclude: That those of Hefner have abandoned their demand for an amount equal to the enjoined judgment, and under the evidence adduced it was well that they did, for they have not proven that their judgment is lost, much

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less that it was lost in consequence of the injunction. Without establishing those facts, they can not recover against the sureties on the bond, and as damages, the amount of the judgment. 3 An. 126.

Those representing Hesse and Verges have abandoned all but one of the grounds on which they based their injunction of the seventeenth of November, 1873. The grounds so abandoned were certainly untenable. The only one they now insist upon is "that the three sheriffs hereinbefore mentioned proceeded at once to seize immovable property before exhausting the movable effects of defendants in execution."

Under the pleadings two principal questions are submitted for our consideration:

First—Were the seizures of Hefner arbitrary and excessive, and, if they were, what remedy should have been resorted to by the seized debtors?

Second—Is the sheriff bound, under all circumstances, to first seize the debtor's movables?

First—Under the evidence, as found in the transcript, it is not an easy task to decide whether the seizures complained of were or were not excessive. The value of the movables seized is not established, and, though the owners swore that the whole of the property then under seizure was worth one hundred thousand dollars, and had cost them three times that amount, the judge of the lower court did not reduce the seizures, but merely ordered the property seized to be released on defendants furnishing bond in the sum of eight thousand dollars.

Hesse and Verges have sued out the injunction, and, to succeed, they had to verify their allegations. They have not done so to our satisfaction. We believe, as they state, that the value of the property seized was considerable, but was said property free from liens and mortgages? This they have failed to show, and their own admission is that all they owned and possessed has been sold, and the price realized has been insufficient to pay their creditors.

The mandate of the law is: "The sheriff shall seize the property of the debtor to a sufficient amount to discharge the payment as well as interests and costs; he may even seize something beyond this amount, to pay the interest which may become due and the estimated costs of the seizure and the sale." C. P. 651.

This court, many years ago, commenting upon this provision of our Code, said: "The question presented for decision is one of considerable importance, but of little or no difficulty. It is whether a sheriff, who finds a defendant's property encumbered with general and special mortgages, can take the whole of it, or at least a sufficient part to satisfy the execution in his hands, over and above the lien by which it is affected,

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or whether he is not compelled to seize an amount equal to that expressed in the writ without noticing the mortgages.

"The sheriff may seize to a greater amount than that mentioned in the execution. His duty is to act in such a way as to give effect, if possible, to the execution. In doing so he has as much right to notice mortgages on the property he is about to seize as he has the right to notice that an object surrendered to him by the debtor is not his property; an adverse doctrine would render it impracticable to make the money from those who have granted mortgages and privileges." 1 N. S. 603, 604.

Can we presume that the three sheriffs to whom were directed the three writs already referred to have violated their duty and the law, or must we presume that they were informed or did themselves ascertain that the property they were instructed to seize was affected by mortgages and privileges superior in rank or otherwise to any right acquired by Hefner under his judgment? Unless the contrary was shown, we are constrained to believe and decide that each of said sheriffs acted in strict compliance with the law, and that they seized only such an amount of property as was sufficient to satisfy the writs which they held.

The district judge maintained the injunction of Hesse and Vergez in so far as it arrested the seizure of the immovables, and dissolved it as to the sugar and molasses levied upon. His decree to that effect was rendered on the seventeenth of June, 1876, more than two years after the date of the order releasing the whole of the property seized from Hesse and Vergez under the judgment of Hefner.

What, then, had become of said property? We have the admission of Hefner, corroborated by the admission of Hesse and Vergez, that, at the date of the aforesaid decree, there was not left a vestige of that property; that the whole of it had been taken under process or otherwise by the other creditors of those parties, and that, nevertheless, some of those creditors were but partially paid.

In presence of these unconnected facts, these legal presumptions, these unexplained admissions, these contradicted statements, can we sustain the injunction or any portion of the injunction applied for and obtained by Hesse and Vergez? There is not a particle of evidence establishing the value of the movables seized, not a declaration on which we can fix or approximate what it might have brought, if it had been sold, and what proportion of its price the creditor might have received. By that value alone would we have been able to measure the alleged injustice of the seizures, the pretended loss of the creditor.

Those seizures may have been made at a critical moment; they may have awakened the suspicions of the other creditors, alarmed the laborers employed on the seized plantations, frustrated the hopes of the

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debtors, ruined them, and ruined their merciless creditor; but they were but the exercise of a right granted by the debtor himself, and, however harsh it may be, we can not limit or condemn the legitimate exercise of a right.

The fact that a seizure is excessive does not justify a resort to the writ of injunction. "If the debtor is of opinion that the sheriff has seized more property than would reasonably be thought necessary to discharge the judgment and costs, he may, on application to the judge who issued the writ, demand that an appraisement be made of said property." C. P. 652. The judge, on that application, "shall order that an appraisement be made of the same by two competent persons whom he shall name and swear for that purpose, and if he shall find by the appraisement that more property was taken than is necessary to satisfy the judgment, he shall reduce the seizure." In this case the seizure was not reduced, but, from the plantations to the most insignificant object, every article of property seized was released.

That unqualified release we condemn as irregular, and for two reasons:

First—Because it was granted *ex parte*, without notice to the creditor.

Second—Because, if excessive, the seizure should have been reduced, limited to specified effects, specified property, and the seized debtor authorized to retain the same on furnishing bond.

Without that notice, how can a creditor protect his interest and his rights against even the most unfounded application? How can he contradict the false or mistaken averments of such an application? How can he prove that the property seized is affected with prior mortgages, higher privileges than his own?

Without the prescribed appraisement, without a specification of what is to be entirely released and what retained subject to the seizure, how can the judge determine that the property seized is sufficient or insufficient to satisfy the creditor's claim?

Is such an application to be allowed on the naked, unsupported affidavit of interested parties—of debtors who, in almost every case, honestly or dishonestly, would not hesitate to swear that any seizure of their property was unjust, excessive, arbitrary; who, blinded by their interests or actuated by the sole intention of defeating or retarding the execution of a judgment, would use and abuse such an irresponsible proceeding? Assuredly not.

The power of the judge in regard to such applications is limited. He can reduce the amount of the property seized, but he can not fix that of the bond to be furnished by the seized debtor. The amount, the form, the condition of that bond, are fixed by law. It must be executed in favor of the plaintiff in execution, *in solido*, with one or more good and sufficient sureties domiciliated in the parish where the seizure was made, for

an amount one-half over and above the estimated value of the property seized, conditioned for the faithful delivery of the property at the time of the sale. R. S., section 3411.

When he furnishes such a bond, the defendant in execution is authorized to retain the property seized until the day of the sale. That bond does not release the seizure; it does not prevent the sheriff from advertising the sale. Its object is to avoid the expensive necessity of a keeper; to save the costs of a keeping. Its express condition is the delivery of the property seized on the day of the sale. If the debtor fails to so deliver, his bond—by that failure—acquires the effect of a twelve-months bond, and execution may issue thereon against the principal and the sureties. R. S., section 3411.

It would be premature to discuss, in this case, the nature and extent of the rights acquired by Hefner under his seizure and his debtor's bond, or the validity or invalidity of any subsequent seizure or sale of the already seized and bound property. If those rights were properly preserved, they could not have been superseded. The injunction merely suspended the executions, and it may be that, at this very hour, they have as much force as they had on the day they were issued. This we mention to show that as yet, and under the evidence, we can not take for granted, as Hefner contends, that his judgment is lost.

Second—Hesse and Vergez base their defense on article 646 of the Code of Practice. That article provides that "if the seizing creditor has no privilege or mortgage on the property of the debtor, the sheriff must commence by seizing the movable property; if there be no movables, he may seize the immovables, unless the debtor point out himself what property he wishes to have seized and sold first, provided the property thus pointed out be situated in the parish."

This article must be construed in connection with article 651, which commands that the sheriff shall seize a sufficient amount of property to discharge the judgment and the costs and interest due at and to accrue after the execution of the writ. In estimating that sufficient, that necessary amount, the sheriff may, and should, as held by this court, notice what prior rights, mortgages, and privileges exist on the property. 1 N. S. 603, 604.

When the debtor's movables are free from liens, when he has enough of such beyond the liens to discharge the judgment, there can be no doubt that the sheriff, unless he be ordered to seize mortgaged property, must commence by seizing movables. In this case, both movables and immovables have been levied upon, and, on the part of Hesse and Vergez, the principal cause of complaint is that the sheriff did not first seize and sell the contents of their store in Thibodaux.

Is their complaint founded in law? On the seventeenth of November,

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1873, the day on which they sued out their injunction, Hefner's judgment amounted, in principal and interest, to over five thousand dollars. The contents of the store was estimated by the witnesses at from forty-five hundred to eight thousand dollars, and sold on the seventh of February, 1874, for \$888 55. It is true that, at that date, a part of it had been disposed of, but it is as true that, if sold under the execution of the thirteenth of November, 1873, the contents of that store, which then was affected by recorded privileges, would hardly have paid one-fourth of Hefner's judgment.

When the sheriff of Lafourche received the writ of *feri facias*, he called on Mr. Hesse to point out what property he wished him to seize. Mr. Hesse refused to do so, and the sheriff then proceeded to seize, under instructions from Hefner's counsel, a plantation and the appurtenances thereon, subject to Hefner's judicial mortgage, and, besides, the movables mentioned and described in his notice, the value of which has not been established. From the recorder's certificate we find that the property in Lafourche was burdened with mortgages and privileges amounting to \$12,861 67, not including interest.

In 3 R. R., pp. 153 and 154, this court said: "It is urged by counsel for defendant that the seizure was illegal, inasmuch as rights and credits can not be seized until after movables, slaves, and immovables, and that it is not shown that any attempt was made to seize any other property. To us it appears a sufficient answer to say, that whatever right the defendant had to point out property is lost if he allows the sheriff to execute the writ without exercising that right." C. P. 649.

Hesse and Vergez contend that the property seized was never advertised and that, therefore, they are still in time to point out property. We believe not; it is not the fact that the property seized has been advertised which concludes the debtor, but the fact that, when called upon to point out property, he refused to do so, allowed the writ to be executed, and, without exercising that right, resorted to an injunction.

In our opinion, that injunction should have been dissolved.

Two hundred and fifty dollars are claimed by Hefner as special damages for attorney's fees. That amount is as reasonable as it can be. The services claimed are shown by the record, and we are thus enabled, without any additional proof, to judge of their value. They have been rendered, and can not be disallowed.

Is Hefner entitled to any other damages? His debtors, we acknowledge, have mistaken their remedy, but was this injunction wanton and malicious; did they not honestly believe that they were exercising a legitimate right? The whole of this property, three plantations, mules, implements of husbandry, sugar, molasses, corn, hay, shingles, seed-cane, growing crops, and cord-wood, had been seized to satisfy a claim

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of a little more than four thousand dollars; their prospects were baffled, their enterprise crushed, and this when they were striving to redeem their obligations and satisfy their creditors. They are liable for their mistake, but not to the extent contended for by Hefner.

We have examined and re-examined the transcript, opened and re-opened the counsel's brief, and we have not found, either in the transcript or the briefs, any evidence to legally convince us that Hefner's seizures were excessive, or his debtor's injunction absolutely vexatious. The evidence on both sides is vague, indefinite, incomplete. We have had to supply with presumptions the missing links of that evidence, and though they are sufficient to authorize a dissolution of the injunction, they are insufficient to justify the claim of Hefner for general damages.

Hefner's counsel have called our attention to the exception taken by them to the admission of Hector Vergez's testimony. Vergez is one of the parties to this suit. At the date of the second trial of this cause he was absent from and had left the parish of Lafourche, and the testimony given by him and reduced to writing on the first trial was properly admitted by the court on the new trial.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be and it is hereby annulled, avoided, and reversed; and, proceeding to render such judgment as should have been rendered below —

It is ordered, adjudged, and decreed that the injunction obtained by Simon Hesse and Hector Vergez, on the seventeenth of November, 1873, be and it is hereby dissolved, and that they, the said Hesse and Vergez, and A. Morilli, I. L. Vergez, and O. Crozier, their sureties on the injunction bond, be and they are hereby condemned *in solido* to pay to Augustus Hefner the sum of two hundred and fifty dollars, with costs in both courts.

No. 6574.

JOSEPH LARGUIER VS. J. HAYS WHITE.

The stipulations made by parties in their contracts, are the law to them, and to their assigns under the contracts, except when such stipulations are in contravention of public law, or good morals.

A PPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *Dewing, J.*

Herron & Bird, for plaintiff and appellant.

E. W. Robertson, for defendant.

The opinion of the court was delivered by

DEBLANC, J. Were we called upon to decide this case according to

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the dictates of equity, we would concur in the views of the district judge and affirm his judgment; but to do so without reservation we would have to ignore the terms of the parties' contract, and, however onerous it may be to defendant or partial to plaintiff, that contract is their law.

At Baton Rouge, on the fifth of January, 1871, William Lee leased a plantation from A. Dupuy for the space of five years. He agreed to pay, as the consideration of that lease, eleven hundred dollars in cash and the balance in four installments, represented by four notes, maturing—the first in two, the second in three, the third in four, and the fourth in five years from the fifth of January, 1871.

Dupuy, the lessor, died shortly after the lease had been entered into, leaving as his universal legatee Joseph Larguier, the plaintiff and appellant. On the foot of the act of lease between A. Dupuy and William Lee plaintiff wrote, on the second of January, 1875, the following declaration, to wit: "The above-recorded lease, with the consent of William Lee, is transferred to J. Hays White." In his evidence before the court Lee said: "I believe Mr. White took the paper with that transfer on it." Whether he did or not, he continued to work the plantation, fully aware of the conditions of the lease, which, in his presence and without any objection on his part, had thus been transferred to him. From that date he was as bound by its terms as Lee himself had been.

Was it only from the transfer to him that White was informed of the conditions of the lease? He was on the plantation as one of the partners of Lee from January, 1871, until the end of 1875; he paid three of the rental notes furnished by the first lessee, and it can not be reasonably presumed that he formed a partnership with said lessee and became his transferee without having read the contract, a copy of which he produced on the trial. That contract was recorded on the twentieth of July, 1871, and defendant must, or at least should have, in his own interest, ascertained every stipulation it contains.

Two of those stipulations are too important to have escaped the attention of either the lessee or his transferee. In the language of the act, the first is: "The improvements Mr. Lee will have no right of removing or payment of the same, except the machinery for the improvement of sugar manufacturing." The second is: "That the lessee will have no right to cut wood, except for the improvement of the place and the manufacture of the crop raised on the place." These stipulations and the fact that Lee and his partners took the plantation in the most wretched condition show most conclusively that the improvements and repairs then needed were afterward to be made as a part of the consideration of said lease; except, however, any machinery brought on or attached to the place for the improvement of sugar manufacturing.

In that description, what kind of machinery is included? In his evidence Lee said: "I thought it meant any new machinery, such as a new kind of sulphur machine, or vacuum pan, or anything like that; nothing was said about any other machinery at the time the lease was entered into; that is all that was said." Any machinery answering that description and brought on the place by defendant or his partners may, under that express stipulation, be taken and removed by them, unless it is attached to said place with lime and cement, and plaintiff elects to retain it and pay its value.

The only thing of that description which may be removed by defendant is a sulphur machine valued at three hundred dollars. As to the boilers, the value of which was allowed to defendant, they are, by their peculiar destination, excluded from that description, and can not be classed as machinery used for the improvement of sugar manufacturing. Under the law, and without a stipulation to the contrary, defendant would have been entitled to either the boilers or their value; under the contract he is not. That contract defines and fixes his rights and obligations as the transferee of the lease from Dupuy to Lee.

Are or are not sub-lessees controlled by the contract between the original parties? In a remarkable decision rendered by Mr. Justice Spofford when presiding as a district judge he said: "It is equitable that they should be so controlled when notified of the contents of the original lease; it is legal that they should be so bound, because the lessee can convey no greater rights than he himself possesses. It makes no difference in such matters whether the lease was recorded or not." In this case it was, and White was more than a sub-lessee—he accepted, without any modification, the transfer of the original lease. 10 An. 628.

The lease commented on by Mr. Justice Spofford contained a clause similar in substance to that found in the lease from Dupuy to Lee, and which was transferred to White; it reads as follows: "And whatever improvements the lessees may choose to make, they have the privilege of doing by leaving the same on the premises, free of charge." In regard to that clause what fell from the pen of the learned judge? *Conventio vincet legem*; if not contrary to the law itself, the contract is the law of the parties; and he referred to the case of Miller vs. McCloud, 11 R. 225, in which such a contract has been recognized as legal and binding.

It can not be successfully claimed that as to the intended repairs the lessor was put in default. The evidence on that point is too vague and indefinite to sustain such a pretension, and it was well said by the Supreme Court, in the case of Shull vs. Banks, that the owners of houses would soon be ruined if it were permitted to every tenant to make such repairs as his fancy or caprice might dictate, without notifying the own-

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ers as required by law. The wisdom of that decision is illustrated by the defendant's reconventional demand. The lessor's claim is for \$1100, the lessee's and his partner's for \$4197 36. 8 R. R. 171.

Defendant relies on the fact that most of the repairs, the price of which he considers himself entitled to, were made in 1872, 1873, and 1874, when, he contends, there did not exist between him and plaintiff the relation of lessor and lessee. That fact we construe against him, for he does not explain how it is that, during those years, the rent was paid without any mention of those repairs or of the intention to recover the price of the same. The lessee's and his partner's silence during that long period strengthens the conviction that the reconventional claims, which were never presented to the lessor, were thought of only after defendant was sued or threatened with a suit.

The testimony of Lee is quoted in the brief of appellee's counsel, with a view, we presume, of charging Dupuy with misrepresentation and fraud. Lee said: "At the time of the lease I went around and examined the machinery in the sugar-house and saw that everything was in bad order. I called Dupuy's attention to the condition of the boilers. He remarked that they were nearly as good as new; that they had lately been repaired at the expense of from two to three hundred dollars, and that left me under the impression that they were in good condition. I found out afterward that they were not. Had I known it, I would have made a different arrangement for the boilers."

Where is the misrepresentation and where the fraud? Lee visited the place, examined the machinery, found all in bad order, and, nevertheless, after that visit and that examination, he either fixed the price of the lease or maintained that which had already been fixed. He cultivated the place from 1871 until the end of 1874, never complained, never asked a reduction of the price agreed upon, and, at this late hour, intimates, though he saw and inspected all he leased, that he was deceived by the lessor. If so, why did he not sue for a dissolution of the lease? The suggestion of fraud and misrepresentation on the part of Dupuy is not sustained by the evidence.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court in favor of defendant be annulled, avoided, and reversed, so far as it condemns the plaintiff to pay to said defendant the sum of twelve hundred dollars, with legal interest from judicial demand and costs of suit.

It is further ordered, adjudged, and decreed that, as amended by this specified and limited avoidance, the judgment of the lower court be and it is hereby affirmed, defendant and appellee to pay the costs in both courts.

No. 6550.

J. U. PAYNE VS. JOHN FURLOW.

An amendment in the pleadings, by which the plaintiff, a liquidating partner, claims to be sole owner of the debt, individually, is admissible.
A confession of judgment, although made in a court without jurisdiction of the case, has the force and effect of an account stated and acknowledged, and is only prescribed in ten years.

APPPEAL from the Seventh Judicial District Court for the parish of Avoyelles. *Hewes, J.*

Irion & Thorp, for plaintiff and appellee.

Thomas Overton, for defendant.

The opinion of the court was delivered by

EGAN, J. The defendant, being indebted to his commission merchants, Payne, Huntington & Co., on an account stated, including notes, on settlement, waived exception of domicile and confessed judgment in their favor before the Fourth District Court of New Orleans, being, however, then and now a resident of the parish of Avoyelles. This was on the fifteenth of February, 1867. On the seventh of April, 1875, owing to the decisions of this court against the right or power of defendant to waive exception of domicile and the consequent nullity of the judgment pronounced upon the confession, the present suit was instituted upon the same cause of action, alleged in the original petition to be an account stated. The plaintiff, who originally sued as surviving and liquidating partner, subsequently filed two amended petitions, the first of which set up the confession of the defendant, and the second, after adopting the allegations of the original and first-amended petition, claimed sole ownership of the debt and cause of action in J. U. Payne, individually. To the filing of the second amendment, as it is termed, the defendant excepted on the ground that it was a substitution of a new party plaintiff, and inconsistent with the averments of ownership in the original petition. It was competent for the plaintiff to acquire an asset which had originally belonged to his firm, and, of course, to allege and prove such acquisition. He has done both. Such amendments are frequent, and the court below allowed this in its discretion. No injury was done to the defendant. The defendant first filed the exception of *res adjudicata*, based upon the judgment rendered on confession in writing in the Fourth District Court of New Orleans. This exception was properly overruled. The defendant answered a general denial, and pleaded the prescription of three, five, and ten years. There is in the record a statement of facts or agreed statement signed by counsel for both plaintiffs and defendants which admits the confession of judgment. The original petition and written confession were filed in evidence, and also satisfactory evidence

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given of the transfer of this debt to J. U. Payne, individually. This written confession might have been proved up and made the basis of a judgment in the court of proper jurisdiction. That it was not so done has enabled the defendant to wage this contest and to bring the case before this court. It was competent to use it as in the present case as to show plaintiff's right of recovery. Whether the present suit be considered as based upon an account stated and acknowledged, or upon this written confession and consent that judgment be entered against the defendant, or both, we think the only prescription applicable is that of ten years, which had not run at the date of its institution. This was the view taken by the judge *a quo*, who correctly overruled the pleas of prescription. The evidence on the merits establishes fully both the amount of the claim as alleged by plaintiff and the individual ownership of it by J. U. Payne. The defenses urged are purely technical and without merit. The debt is due as demanded by plaintiff and confessed by the defendant.

The court below gave judgment for plaintiff accordingly, and we affirm it.

No. 6531.

BERNARD SOULIÉ vs. LOUIS RANSON.

The charge given to a jury, by the judge of the court *a qua*, is not a necessary part of the record.

Declarations, averments, and admissions made by parties in judicial proceedings can not be subsequently denied by them.

The agreement by which a creditor, who has bought his debtor's property, stipulates to reconvey it to the debtor on condition that the latter pays a certain price within a certain time, is a valid contract, and if the debtor fails to pay the price, in accordance with the terms of said contract, his right of redemption will be forfeited, and the title of the property will vest absolutely in the purchaser.

29	161
105	583
29	161
107	386
29	161
125	931

APPEAL from the Fourth Judicial District Court, parish of St. Charles. *Flagg, J.* Trial by jury.

James D. Augustin and Charles E. Schmidt, for plaintiff and appellant.

Gus. A. Breaux and Julien Michel, for defendant.

The opinion of the court was delivered by

MANNING, C. J. The defendant was indebted to the plaintiff for loans and advances made before the late war, amounting to \$26,703 66, the payment of which was secured by mortgage upon his sugar plantation in the parish of St. Charles. In 1867 plaintiff sued upon his debt, and recovered judgment for the above sum with eight per centum per annum interest, and twelve hundred dollars attorney's fees, and his mortgage was recognized. Execution issued upon this judgment, and in April, 1868, the plaintiff bought the mortgaged property at sheriff's sale for eighteen thousand dollars cash.

Previous to the institution of that suit a verbal arrangement had been made by the parties, which was reduced to writing and signed the twenty-third of January, 1868, before the issuance of the *feri facias*, and which is of so much importance that its chief provisions shall be quoted *in extenso*. It may be observed that the coroner was the executive officer who conducted the sale, the defendant, Ranson, being the sheriff of the parish at that time.

The preliminary recital mentions the name and the residence of the plaintiff and defendant, and declares that the agreement witnesseth—

First—That the said Soulié shall cause to be seized and sold by the coroner of the parish of St. Charles, by virtue of a judgment rendered in the Fourth Judicial District Court for said parish, in the case of Bernard Soulié vs. L. Ranson, No. 590 of the docket of said court, a certain tract of land belonging to the said Ranson, established as a sugar plantation and situated in said parish on the right bank of the river Mississippi, between lands belonging to Mr. J. L. LaBranche above and lands of Freret Brothers below, and the undivided half of that certain tract of land lying on the Opelousas railroad and on the Bayou des Allemands, known as the Vacherie; as the whole is more fully described in the petition filed in the above-entitled suit.

Second—That the said Ranson will pay all expenses attending the issuing of the *feri facias* and the sale of the plantation, including advertisements, commissions, etc., and that he shall cause the property to be appraised at the lowest figure possible.

Third—That the said Soulié binds himself to bid in and buy the said property at the said coroner's sale; provided it be not bid up by other parties over \$36,400.

Fourth—And the said Soulié binds himself, in case the above article should take effect, to reconvey and sell to such persons as the said Louis Ranson shall designate, with a good and sufficient title, but without warranty, the above-described portion of ground on the river Mississippi, established as a sugar plantation, for the price or sum of \$36,350, payable in five equal installments of one, two, three, four, and five years, in notes bearing mortgage on said property, with interest at the rate of eight per cent per annum from the first of March, 1868, the clause of *non alienando*, and five per cent as lawyer's fees in case of proceedings to enforce the payment of said notes.

Provided, that in case the said Ranson shall not have designated a person to whom the sale of the property is to be made, and who shall execute the notes as above provided, prior to the first of March, 1869, then the first installment due agreeably to this article on that day, with eight per cent interest, shall be paid by said Ranson, and his failure so to do shall work a nullity of this contract, without his being put in *mora*, and so for the following successive installments.

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Fifth—It is the spirit of this agreement that the crops to be made on said plantation are to be wholly affected to the payment of its price as above stipulated. Therefore the said Ranson, or the person he may appoint, promises to give all his attention to the culture (cultivation) of the land and the preservation of the improvements; to use his best efforts to make crops as large as possible, and he binds himself to apply the entire net proceeds of said crops—after paying the expenses incurred for raising the crops with the utmost economy—to the payment of said notes or installments, with interest as above stipulated.

The sixth clause relates to another tract called the Vacherie, which Soulié engages to sell if he can, on such terms and conditions and at such price as he may think proper, and to apply the sum realized by such sale to the extinguishment *pro tanto* of the notes specified in the fourth clause.

From the close of the war in 1865 to the date of this agreement the plantation does not appear to have been cultivated, except in making the necessary preparations for a sugar crop. The condition of the place at the close of the war precluded any attempt at successful cultivation. It had been in some sort abandoned, the fences and houses were dilapidated, the ditches filled, and the former cultivated fields had become a waste, covered only with weeds and willows. In 1868 the preparations for future cultivation had been brought to sufficient forwardness to permit the hope of a crop for the following year, and on the twentieth of January, 1869, Ranson made application to the firm of B. & A. Soulié for assistance in the way of supplies and advances to make a crop during that year. The result of this application was an agreement by which that firm engaged to make advances not to exceed eight hundred dollars monthly, upon which they were to charge a stipulated interest and commissions. This arrangement lasted four years, viz.: from 1869 to 1872, inclusive, and at the expiration of that time the expenses incurred by Ranson and paid by the Soulié firm largely exceeded the receipts from sale of crops. Bernard Soulié became subsequently the transferee of this claim of the firm.

Near the close of 1872 Soulié declined to advance money or furnish supplies any longer, and then followed correspondence and negotiation which will be detailed at length in plaintiff's testimony, the result of all being that Soulié persisted in his refusal, and at length leased the property to John Kelly, who took possession of the plantation. About the same time, or shortly thereafter, Ranson removed eight mules from the place, and, after an interval of a day or two, fourteen other mules and all the implements of husbandry, etc.

Thereupon the present suit was instituted, wherein the plaintiff alleges that the defendant had tortiously removed those mules and other speci-

fied property, in value three thousand dollars, from his plantation, and prayed and obtained writs of sequestration, which after some delay were executed. Exceptions having been made to the sufficiency of the averments of the sequestration, and overruled, the defendant answered, denying that any of the objects thus sequestered belonged to plaintiff, and prayed damages for the illegal sequestration. Then, assuming the quality of plaintiff in reconvention, "he admits and avers that the plantation mentioned in the petition belongs to plaintiff, who has acquired it as stated in the petition, and he further admits and avers that after the adjudication thereof to plaintiff he, Ranson, continued in the possession thereof with the right of working the same on condition that he would send his crops to the plaintiff, Soulié, to be disposed of by the firm of B. & A. Soulié, of which he is a member, the proceeds to be applied to the payment of all disbursements made for the working of the plantation, the balance to be paid over to the defendant, Ranson."

He then alleges that, pursuant to this agreement, he did send the crops to the firm of Soulié, and that no account of their sale has ever been rendered to him; that the cost of buildings, constructed or repaired, on the plantation, and also the cost of necessary work upon the land, "for their account," has been charged to him, Ranson, and that while some parts of this expense have been paid by the Soulié firm, other items amounting to \$5711 25 have not been paid by them, but charged to defendant, and a memorandum or itemized statement of such charges is annexed; that a quantity of valuable effects was left by him on the plantation, belonging to himself, which plaintiff has appropriated, and he finally prays that the members of the Soulié firm be condemned to pay him blank sum of dollars for these various matters of alleged indebtedness.

It is apposite here to notice a novel and unprecedented proceeding on the part of the attorney whose name is signed to this answer. It is an affidavit filed in this court since the oral argument, that this answer was not intended to be used as a part of the pleadings, that he never requested the clerk to file it, and that during the progress of the trial it was never alluded to nor noticed to be of record. Whatever may have been the attention, or want of attention, paid to this answer in the trial in the lower court, it received very marked notice from the counsel of the plaintiff in the oral argument before us. We find it in the record duly certified, and we do not find any attempt by motion or otherwise, prior to or on the trial below, to excerpt it from the pleadings, or to disown its authenticity. Papers once filed by an attorney, of record in a cause, can not be ignored on the plea that the clerk had no special direction to file them, or that no particular attention was paid to their contents in the trial, and particularly is this the case when the paper in question is a

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Vital part of the pleadings, drafted by the attorney with elaborate care, and signed as the attorney in the identical case in which it is filed.

Another answer was filed afterward on same day, signed by the local counsel and also by his associates, in which the defendant denies that plaintiff has any right of ownership in and to the property sequestered, and avers that the sale made of the plantation under judicial process was never intended to be a sale translativ of property as between the parties, and was never so treated by Soulié until January, 1873, and that defendant was left in possession of the property because of that fact, and continued to possess it as owner; that the agreement of January 23, 1868, was superseded by another, in which Soulié contracted to supply Ranson with means to cultivate the property, which disbursements were to be paid by proceeds of sale of crops shipped to the Soulié firm, and the residue applied to the extinguishment of the debt of Ranson; that in 1870 defendant had an opportunity to sell the property at seventy-five thousand dollars, which would have extinguished his entire debt and given him a surplus of forty thousand dollars, and that he declined the offer, because Soulié advised and urged him not to sell, and promised as a consideration for compliance with his wishes that he would advance all the means necessary for the cultivation of the place; that by reason of Soulié's fraudulent non-compliance with his engagement defendant has been damaged in the full amount of Soulié's debt, and forty thousand dollars besides. A further damage of three hundred dollars for the illegal sequestration is alleged, and judgment is prayed for both sums in reconvention.

Upon these issues the parties went to trial, and a jury rendered a verdict dissolving the sequestration, with three hundred dollars damages, and annulling the sale of April 4, 1868, with twenty-five thousand dollars damages upon the reconventional demand. Judgment was rendered against Soulié accordingly, who appealed.

A motion to dismiss the appeal is made in this court upon the ground that the written opinion of the judge *a quo*, read to the jury, is not in the record. The clerk certifies that there is no written charge of the judge on file, and that the minutes of the court do not show the filing of any. It is not necessary that it should be in the record. This court hears the case anew in its entirety, and reviews the verdict of the jury. If they should have been misled by the charge, or, as in this case is alleged, disregarded the charge, their error can be corrected here without reference to the probable influence of the language of the court upon them.

The motion to dismiss can not prevail.

The record is very bulky, but, notwithstanding its forbidding aspect, we have examined it with diligent minuteness. It discloses one of those

personal histories whose mournful sadness is not relieved by the frequency with which they are met, but is rather intensified by the legal consequences which follow them. Ranson returned from the perils of war to find his fair heritage a wilderness of waste. Undaunted by the difficulties attendant upon recuperation, and refusing to succumb to misfortune, he undertook the repair of his shattered fortunes with manly and hopeful courage. From 1865 to 1869 his occupation was cutting and selling wood, which he was enabled to begin by the loan of a pair of oxen from a neighbor. Gradual preparations were made during these years for future cane planting, and in 1869 the first crop was essayed. Meanwhile a judgment had been obtained against him, and his property had been sold. The verity and reality of this sale, maintained on the one hand and denied on the other, is the pivot upon which our judgment must turn.

The testimony of the parties to the suit, and to the agreement of January, 1868, is the source from which we are to derive our knowledge of their intentions and purposes, guided, in case of conflict, by the circumstances under which they acted.

The plaintiff, Soulié's, narrative is as follows:

"On the fourth of March, 1867, with Mr. Ranson's assent, and in perfect understanding with him, I entered suit against him for the amount of my debt. He stated that he had what would plant the next season not less than one hundred arpents of cane, and was sure, if I would grant him one, two, three, four, and five years time, he could pay me back my money and redeem his plantation. This occurred in the parish of St. Charles on the fourteenth of March, 1867. He was then working the place on his own hook. He was cutting cord wood, and with the proceeds of that wood working the cane. I recollect that, speaking of the number of mules he had on the place, he mentioned something more than thirty, and he certainly had all the implements of husbandry to work his cane, nor did he speak of any of the mules belonging to his wife.

"On the fifth of June, 1867, judgment was rendered in my favor in the suit already mentioned. In accordance with the arrangements above recited, on the twenty-third of January, 1868, we entered into the agreement under private signature which is on file. On the fourth of April, 1868, the property was sold under a writ of execution, and adjudicated to me for eighteen thousand dollars, and a deed executed. The above-mentioned contract thereby took effect. It must be observed that in that contract Mr. Ranson undertook to work the place as a sugar plantation, and he did so work it for that year with the mules and tools he had. On the twentieth of January, 1869, Mr. Ranson called on me and represented that he was unable to carry on the plantation any longer without assistance, and requested me to come to his aid. I having, unfortunately,

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consented, we drew up and signed an agreement of B. & A. Soulié of that date which has been assigned to me.

"From the first year Mr. Ranson has largely exceeded the amount agreed upon (eight hundred dollars monthly), and has never raised a paying crop. (Here follows a statement in figures of receipts and disbursements.) Thus it will be seen that in the four years Mr. Ranson worked the plantation he sank the enormous sum of \$28,868 06, exclusive of interest and commissions. Moreover, I had advanced to him in 1870 seven hundred and twenty dollars to pay the schooling of his two youngest boys, and I loaned him three hundred dollars to pay the expenses attending his daughter's marriage. On the twenty-eighth of December, 1871, in view of the disastrous results then made manifest I wrote Mr. Ranson that I withdrew from the agreement of the twenty-third of January, 1868, and that I held myself free from its provisions and at liberty to enter into any new arrangement I might see fit with regard to the plantation by virtue of our contract."

The witness then states that he yielded to Mr. Ranson's importunities, and continued to supply him another year, with the same disastrous result, and finally, in December, 1872, refused to go on longer, and informed Ranson that he should let the plantation, and would give the preference to Ranson if he could get any one to supply him. Ranson said he could manage to go on cultivating, but the means upon which he relied were so slender and so precarious that Soulié thought it was folly to rely on them, and declined to let the place on such prospects. He informed Ranson that he had a good tenant in view, and as he did not wish to put him out on the road he would give him another house to live in until he could find something to do. Upon this Ranson said, "You may rent."

The place was rented to Kelly, reserving the house and dependencies, which had been placed at Ranson's disposal. The lessee took possession on the third of February, 1873, and required an inventory of the movables to be made, which was to be done in a few days. Soulié proceeds: "Thus matters stood. Never had a word of reproach escaped Mr. Ranson's lips; on the contrary, he had extolled my kindness to him to the utmost. He often said I was a father to him," etc. The removal of the mules, etc., followed.

Ranson's version of the transaction is as follows:

"In 1868 Mr. Soulié and myself came to the agreement that I should sell the plantation to arrange my business, and it was perfectly understood that the plantation was to be bought by him, and according to contract he was to buy the place, and I was to dispose of it as if still my own; it was to change nothing except as to the naked title of the plantation. I always continued in the possession of the property, and there never was any change."

After describing the condition of the plantation at the close of the war, and, stating his own occupation for three years immediately succeeding that event, he proceeds: "I cultivated a very small quantity of cane for seed in 1868. I had stock which was engaged in the wood business. I had twenty-six mules and oxen. It was with my own money I bought that stock, money earned with my wood, and in my office of sheriff. That was the stock used in carrying on my wood business, and I afterward used the same stock in cultivating the plantation. I used them in cultivating the plantation after the sale, and under the agreement with Soulié. * * * I bought some seed cane from different parties, small quantities; that is the way I started. I managed my place according to my own judgment, and allowed no one to interfere with said management, it being my place."

The offer of seventy-five thousand dollars for the place, through Meunier, a broker, is then detailed, and he says he wanted to sell, but Soulié dissuaded him, as in his opinion it would be an act of folly, and that he could make his fortune on the place, and get back all he had lost. Ranson replied that he had no means to carry on the planting, and Soulié rejoined that he would furnish him as long as he lived, and would fix his business so that this help should be continued after his death. The offer was declined, defendant says, because of these assurances of Soulié.

"When Mr. Kelly came to the place," the defendant is again speaking, "I told him he could take the house, and I moved to a house on my old place. My reasons for so doing were that, knowing the tract I was living on was bought by Mr. Soulié, and as I had never paid for it, I thought I had no business on Mr. Soulié's premises." Kelly informed him Soulié had rented him the place with the mules, carts, and utensils, and defendant said that could not be correct, as eight mules belonged to his wife, and he affirms that he expressed no willingness to let the fourteen belonging to himself go with the place. Four of these fourteen are dead. The eight belonging to his wife were bought with her money. She is separated in property.

Soulié has no recollection of the conversation with Ranson touching the offer of seventy-five thousand dollars for the place, and, indeed, denies that it occurred. Meunier, the broker, says the offer was made to his partner, White, and that he was not present, and that it was made by a New York insurance agent, then in New Orleans, for other parties, but he does not disclose the names of these parties, nor even of the insurance agent, with whom he had no personal communication.

Mr. Kelly, Jr., son of the lessee, was present at the conversation of his father with Ranson, when the latter came to take possession of the plantation. "Ranson said it was all right, except as to the mules, eight

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of which belonged to his wife, but the lessee refused to receive less than the full number, and, announcing that he would have an inventory made, Ranson then said it was immaterial to him, that he was ready to turn over the fourteen mules any day."

The testimony of other witnesses is before us, a detail of which would swell this opinion inconveniently and unnecessarily. It is duly considered in forming our conclusions upon the facts.

The sale of the fourth of April, 1867, controlled in its effect by the agreement of January 23, 1868, which was only putting in more durable form the oral agreement contemporaneous with the sale, has all the features of the *vente à réméré*. The Code thus defines this right of redemption. It is an agreement or paction, by which the vendor reserves to himself the power of taking back the thing sold by returning the price paid for it. Civil Code, articles 2545 *et seq.*, new Nos. 2567. It is a literal translation from the Code Napoleon, omitting a part not of significance here. Code Napoleon, article 1659.

The price paid by Soulié was eighteen thousand dollars, and that stipulated to be paid in redemption was \$36,350, and it is "the price paid for it" that the Code designates as that to be returned under this species of sale. It is apparent that the larger sum was really the price paid by Soulié, since his debt amounted to that. The sale was to operate an extinguishment of the mortgage debt. The redemption price should be the amount of that debt with its accruing interest. But were it otherwise, the French authorities sanction the validity of a stipulation for the return of a larger price.

Gilbert, annotating the article of the Napoleon Code already mentioned, says :

"On peut valablement stipuler que le vendeur paiera à l'acquéreur une somme plus forte que celle constitue le prix de la vente." 9 Mars, 1808.

Pothier says such an agreement has nothing illicit in it (*Traité du Contrat de Vente*, No. 413); and Merlin is of same opinion. *Repertoire, Faculté de Rachat*, No. 8. The commentators are not, however, in entire unanimity, but the reasoning of Delvincourt and his two associates in opinion does not apply in this case. Duvergier combats them thus :

"Si l'on se borne à dire que cette stipulation décele la fraude et l'usure, que les tribunaux à qui l'on ne fournira point d'explications satisfaisantes, qui d'ailleurs apercevront d'autres indices, pourront annuler la convention ou réduire les intérêts, je ne conteste pas cette doctrine; mais on est évidemment dans l'erreur si l'on prétend avec MM. Delvincourt, Duranton, et Troplong, que la convention est *illicite*. Ces auteurs ont cédé à un mouvement naturel d'animadversion contre les ruses des prêteurs. Préoccupés du désir louable de déjouer leurs spéculations, ils ont créé une prohibition que la loi n'établit point; ils ont déclaré toujours et de droit frauduleuses et usuraires des stipulations qui

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le sont souvent, mais qui quelquefois peuvent être loyales et légales; confondant ainsi, il faut bien le dire, les innocents avec les coupables.

"Pothier a reconnu que la convention n'a rien en soi d'illicite, et un arrêt de la Cour de Paris a consacré cette doctrine." Tome 2, No. 12.

The stipulation for an increased redemption price in this suit was not a cloak for usurious charges.

This sale, with right of redemption, under the circumstances of that time, seems to us a natural arrangement for the parties. Both appear to have had great confidence in the future. No doubt Ranson thoroughly believed in and trusted to his ability to meet the stipulated payments. All he wanted was the help of capital to enable him to utilize his splendid opportunities, and Soulié was the god who could dispense the shower of gold. If the mortgage were foreclosed without an arrangement between the parties, Soulié might become the owner, unhampered by any obligation touching the redemption. And here the defendant's counsel earnestly insist that the true interpretation of Soulié's conduct is that all of his complaisant promises were made to induce Ranson to accord him a judgment without opposition, for, if prescription had been pleaded, Soulié's debt was lost.

This is reading events of that day by the light of the present time. In April, 1867, the date of rendition of this judgment, prescription was not supposed to be legally applicable to debts situated like this. Deduct the years of the war, and the debt was safe. And prescription was a plea invoked by few in those days against a just debt.

The doctrine of this court in April, 1867, was that the circumstances and facts of each case, and the respective situations of the parties must, be taken into consideration in applying the plea of prescription. *Munson vs. Robertson*, 19 An. 170. Throughout the Annual Reports of 1868 there was a hazy indefiniteness on the bench and at the bar upon this mooted question. *Rabel vs. Poarciau*, 20 An. 131; *Durbin vs. Taylor*, *idem*, 219; *Payne vs. Douglas*, *idem*, 280; *Marcy vs. Steel*, *idem*, 413; *Norwood vs. Mills*, *idem*, 422 *Lemon vs. West*, *idem*, 427; *Schlenker vs. Taliaferro*, *idem*, 565.

It was not until February, 1869, that this court authoritatively and unqualifiedly declared that the maxim *contra non valentem agere non currit prescriptio* has no application in our system of jurisprudence, and thus terminated the dispute in which the chances of victory had often oscillated. *Smith vs. Stewart*, 21 An. 67.

But, independent of all this reasoning upon probabilities, there is the actual fact that Ranson did agree that in case neither he nor the person whom he should designate performed the acts specified in the writing of January, 1868, by a given date, "his failure so to do shall work a nullity of the contract." The answer to this suit, prepared and exhibited to

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Soulié before his departure for Europe, when his first deposition was taken, "admits and avers that the plantation belongs to the plaintiff," and, although the second answer is filed the same day as the first, it was prepared some time afterward under new advice, and when a change in the defense was deemed advisable. It is not permissible to deny what one has solemnly acknowledged in a judicial proceeding. The admissions are made stronger by being transmuted into averments which he can not be permitted to gainsay. *Estill vs. Holmes*, 3 Rob. 134; *Gridley vs. Conner*, 4 An. 417; *Denton vs. Erwin*, 5 An. 18.

It follows that the defendant is not entitled to damages for Soulié's refusal to sell what was his own, and we may add, had the property been Ranson's, he could not recover damages from Soulié for giving him bad advice in relation to an act the performance of which depended on his own volition.

Reverting now to the original action, it is abundantly proved that the mules on the place at the time of the sale of the plantation were bought with the defendant's own money and his wife's paraphernal funds. We find nothing conveyed in the *proces verbal* of sale besides the land. Neither mules nor implements of husbandry are mentioned, or included in its terms. After the sale, and during the four years cultivation, many mules were bought with Soulié's money, but Ranson is charged with the funds thus expended. This cultivation of the plantation by Ranson is under a contract quite distinct from that of January 1868—so distinct that his counsel insist it superseded the first contract—and the property purchased then was bought and charged after the same fashion that factors here observe in their purchases for their country clients. The planter orders the animals or other things needed. The factor buys, or has them bought, and charges the price, with commission, to the planter. The animals belong to the planter. The factor is creditor to him for the price, etc.

Soulié has not sued for the price of the mules. His sequestration is based upon the theory of ownership, which has been demonstrated to be unfounded.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court setting aside the sequestration of the mules with three hundred dollars damages against plaintiff is affirmed, and it is further ordered, adjudged, and decreed that the judgment of the lower court in favor of the defendant upon his reconventional demand annulling the sale of the plantation, with twenty-five thousand dollars damages, is avoided and reversed, and that said reconventional demand be rejected, and that defendant recover of plaintiff the costs of both courts, except the costs of the reconventional demand, which are to be paid by him.

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No. 6204.

MARY HARDY VS. JOHN A. STEVENSON.

29	172
52	1024
29	172
117	678

An arrest, without probable cause, raises a presumption of malice.

On assessing the damages for an illegal arrest the *character* of the complainant should have some influence in determining the amount of damages.

A PPEAL from the Fifth Judicial District Court, parish of Iberville.
Trial by jury. *Dewing, J.*

Barrow & Pope, T. & E. J. Ellis, and James Lingan, for plaintiff and appellant.

Breaux, Fenner & Hall, for defendant.

The opinion of the court was delivered by

MORGAN, J. In Leovy's Digest of City Laws, page 323, article 680, is found the following ordinance: "It is unlawful to abuse, provoke, or disturb any person, to make charivari, or to appear masked or disguised in the streets, or in any public place."

On the seventeenth of September, 1873, John A. Stevenson, the defendant, went before the then recorder of the First District and made the following affidavit:

"John A. Stevenson, Upper City Hotel, who having been duly sworn doth depose and say that on the seventeenth day of September, 1873, on Gravier street, in this district and city, one Mary Keener did then and there, while affiant was conversing with friends, rudely present herself to him and address him in threatening and insulting language. And affiant further says that the accused has frequently heretofore assailed him in a manner scandalizing him greatly, and for the purpose of illegally extorting money from him, and affiant believes, and has reason to believe, that the accused will commit a further breach of the peace unless she be restrained by law. All against the peace and dignity of the State. Wherefore deponent charges the accused with insult and abuse and disturbing the peace, and prays that she be arrested and dealt with according to law."

Under this charge plaintiff was locked up in a cell from about one o'clock to eleven o'clock p. m., when she was released on bail. Subsequently the proceedings were dismissed, no one appearing on the day of trial to prosecute. She brings this suit for fifty thousand dollars damages for false imprisonment.

We give the statement of the defendant as to the cause of the arrest. He says that on the day in question, while he was in conversation with a gentleman on Gravier street, near St. Charles, he saw the plaintiff; that he attempted to avoid her, knowing that she would speak to him; that after walking a few steps he met another gentleman with whom he stopped to speak, and had said but a word or two when plaintiff pre-

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sented herself close to him, with looks of menace; that he left this gentleman, going toward the corner; that plaintiff followed close by his side until he reached a point where another gentleman was standing, to whom he spoke, saying, "Here is this woman following me and annoying me again." He requested the gentleman to endeavor to induce her to go away from him. The gentleman asked plaintiff, "Why don't you let this man alone?" To this question she made no reply that he recollects, except by her manner and looks, which were defiant. His companion repeated the question, and then said to him that he would have to resort to the police. They then went up St. Charles street, the plaintiff following closely, so closely that his companion feared she would do him (the defendant) some great bodily harm. He says he made the affidavit to protect himself from the plaintiff's following and approaching him in the streets before gentlemen, and from being scandalized, and to get his peace and that of his family. There is no evidence that the plaintiff assaulted the defendant, or that she even spoke rudely to him when she saw him on Gravier street, or during their walk to the recorder's office. What occurred while she was before the recorder we take from the recorder's testimony. He says that Stevenson came to his office and stated that the plaintiff annoyed him; that she met him in the street and was using language which was not respectable (respectful) to him, and he wanted to put a stop to it; that plaintiff accompanied him; that defendant remarked if she would give a bond to keep the peace it was all he would require; that he, the recorder, asked her if she would give the bond, and that she answered no, that she had done nothing to Mr. Stevenson which would require her to give a bond; that Stevenson then said he was willing she should give her own recognizance, which she refused; that he told her if she did not he would have to send her to prison; that she said she did not care, she would not give a bond; that she had done nothing that would require it. Then the affidavit was made against her, and then, without an investigation as to the facts alleged therein, she was "locked up." Her own account of what occurred up to the time of her incarceration does not differ in any material particular from the testimony of the defendant and his witnesses. She was confined in a cell. The turnkey endeavored to find two parties whom she named, but was unsuccessful. Her residence was distant from the place of her imprisonment, and her daughter, with her companion, came to her between eight and nine o'clock at night. Plaintiff was standing up when they came; she was separated from them by iron bars; she endeavored to reach them, but, overcome by emotion, she staggered and fell upon a box containing nuisance; when she recovered she was lying on a filthy mattress, which was alive with vermin.

Taking the case as it is stated by the defendant, and confining ourselves

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entirely within the limits of the occurrences of the seventeenth of September, as the defendant insists that we should, and we have before us an arrest and imprisonment at the instance of the defendant without any justification therefor. The affidavit upon which the plaintiff was imprisoned was false, and is proved to be false by his own testimony. It charges the plaintiff with having rudely presented herself to him, addressing him in threatening and insulting language, with abuse, and with disturbing the peace. His own testimony shows that she did not abuse him; that she did not threaten him; that she did not insult him; and that she was not disturbing the peace. This case is one in which a man, using the machinery of the law to that end, caused the arrest of a woman who was doing no wrong, and had her confined in the cell of a prison without any justification whatever therefor. That the plaintiff is entitled to exemplary damages for such treatment can not be questioned.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be avoided, annulled, and reversed, and it is now ordered, adjudged, and decreed that the plaintiff do have and recover judgment against the defendant in the sum of five thousand dollars, with costs in both courts.

WYLY, J., *dissenting*. I agree that the defendant caused the arrest of plaintiff without showing probable cause. Malice is presumed. Damages should be imposed, but five thousand dollars is disproportionate to the offense; it is excessive. I think one thousand dollars sufficient. The policy of the law in enforcing vindictive damages is to correct the evil—to deter others from committing the offense. It is not to enrich the party wronged, or to destroy the wrong-doer.

I therefore dissent in this case.

Rehearing granted.

ON REHEARING.

The opinion of the court was delivered by

SPENCER, J. This case has been twice tried by jury in the lower court. On the first trial the jury gave a verdict for plaintiff of ten thousand dollars. On the second, a verdict for defendant. Judgment having been entered accordingly, plaintiff prosecutes this appeal. The case is now before us on a rehearing, granted by our predecessors to the defendant, who was, by the decree of this court, condemned to pay plaintiff five thousand dollars damages.

On the first hearing in this court, the opinion was unanimous that the arrest of plaintiff, on the seventeenth of September, 1873, was procured

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by defendant without probable cause, and therefore, by presumption, maliciously.

We have given the facts of this case very careful consideration, and are constrained to the same conclusion as our predecessors, that the arrest on the seventeenth of September, 1873, was without probable cause, as shown by the defendant's own statements as a witness. He says "that he was not threatened by words by the plaintiff, Mrs. Hardy, that day, September seventeenth; she did not use any threatening language that day while he was talking with his friends on Gravier street; she used no threatening language before Judge Hunt spoke to her, and no insulting language; she used no language at all. That it was her rude and brusque manner in presenting herself to him and her angry looks that constituted the breach of the peace complained of in his affidavit; that the threatening and insulting language he complained of in the affidavit was such as this: "Are you not going to do something for me? When are you going to do something for me?" She did not threaten him personally that day in words, or abuse him personally that day, beyond the usual running conversation she had with him while walking with him up St. Charles street. * * * She was not talking very loud, etc.

This statement of the facts by the defendant himself is certainly inconsistent with his affidavit that she "did then and there, while affiant was conversing with friends, rudely present herself to him, and address him in threatening and insulting language."

If this affidavit was made under the city ordinance declaring it "unlawful to abuse, provoke, or disturb any person * * * in the streets or in any public place" (which seems doubtful), we do not think the facts stated amount to the offenses of "abuse, provocation, or disturbance" contemplated by that ordinance.

We do not wish to be understood as indorsing the proposition that a woman of doubtful character has the right to shadow, and, as it were, dog a man about the streets, for the purpose of annoying him or extorting money from him. We have no doubt that defendant (not without fault himself) had been on many occasions greatly annoyed—perhaps "abused, provoked, and disturbed"—by the plaintiff. But on this particular occasion we do not find in her conduct such abuse, provocation, or disturbance as would excuse the defendant in having her arrested and imprisoned. We think he acted unwarrantably and hastily, and must pay the plaintiff such damages as will reasonably compensate her for the injury and wrong done to her person, her feelings, and reputation.

In the oral argument the counsel suggested that it was desirable that the court should now finally dispose of this case, without remanding it

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for another trial by jury. We concur in these suggestions, for this record does not re-assure one of the advantages of jury trials.

We are not inclined to award the plaintiff vindictive damages. The proofs in this record satisfy us that, though not excusable for arresting the plaintiff on the seventeenth of September, the defendant had previously suffered great annoyance from her. That she had not always, even on the streets, conducted herself toward him in a very ladylike manner. She was a mature woman and widow when her acquaintance with him began, and has no very great claim to sympathy for the results, certainly not much more than he has. Both, perhaps, deserve the pity of the charitable, for "to err is human."

We do not think that plaintiff is entitled to such damages as would be awarded to a pure and unblemished woman; character, reputation, ought to be considered, as well as the actual physical and mental suffering of the injured party. Considering all the facts, condition of the parties, the length of imprisonment, its effect upon plaintiff's health, the mental suffering resulting from the incarceration, her standing in the community, we think that a judgment for fifteen hundred dollars is sufficient compensation to her and ample punishment of the defendant.

It is therefore ordered, adjudged, and decreed that the verdict of the jury and the judgment of the lower court be avoided and reversed; and it is now ordered and decreed that the judgment heretofore rendered by this court be amended so as to reduce the amount allowed the plaintiff to fifteen hundred dollars, and that defendant pay costs of both courts.

No. 4691.

CHAFFRAIX & AGAR VS. PRICE, HINE & TUPPER. MORTON, BLISS & Co.,
INTERVENORS.

In the interpretation of commercial contracts, this court will be largely influenced, and guided, by the law merchant of the United States, and the constructions of that law made by the Supreme Court of the United States.

Where a party shares in the profits of a partnership, not as a principal, but as an agent, or employee, who receives a certain proportion of the profits in compensation of his services, he is not a partner.

APPEAL from the Sixth District Court, parish of Orleans. *Saucier, J.*

T. Gilmore & Sons and Lea, Finney & Miller, for plaintiffs and appellees.

Breaux, Fenner & Hall, for defendants.

Carleton Hunt and William H. Hunt, for intervenors.

The opinion of the court was delivered by

MORGAN, J. On the twenty-eighth of December, 1872, plaintiffs brought this suit against the defendants, Price, Hine & Tupper, alleging that on

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the — day of December they sold to defendants seven hundred and eighty barrels of molasses, for the price of \$19,170, payable cash on delivery; that the delivery of the molasses, or a portion thereof, had been made within five days prior to the institution of their suit, and that they have a special lien and privilege on the molasses, and that they fear the defendants will part with or dispose of it pending their suit. They prayed for a sequestration of the molasses; that Price, Hine & Tupper be cited to answer their petition, and that they have judgment against them for \$19,170, with special vendor's lien and privilege on the molasses for the payment thereof. The writ issued as prayed for.

On the fourth of January following, and before issue joined, plaintiffs filed a supplemental petition, in which they alleged that, through misapprehension of counsel, it was incorrectly stated that the delivery of the molasses, or a part thereof, had been made "within the last five days," and they averred that none of the molasses in question was ever delivered to the defendants. They allege that in some manner, to them unknown, the defendants, without their (the plaintiffs') knowledge or consent, procured warehouse receipts to be issued by the New Orleans Sugar Shed Company, and by one Rodd, for a considerable portion of the molasses, which had been removed from the levee by the wharfinger of the city because it was there in contravention of city ordinances, and placed in the charge of the said company and the said Rodd, and that as to the remainder of the molasses, for which warehouse receipts were not procured, the defendants took possession thereof without plaintiffs' consent or authority.

On the sixth of January Price, Hine & Tupper answered. They disclaimed any ownership of or interest in the property sequestered. They averred that, long prior to the sequestration, the molasses had been sold and delivered to Morton, Bliss & Co., and by them paid for, through their agents, J. B. Lafitte & Co. They prayed that Morton, Bliss & Co. be notified of these proceedings and cited, and that they, Price, Hine & Tupper, be dismissed.

On the seventh of January Morton, Bliss & Co. intervened. They claim to be the owners of the sequestered molasses, and aver that they were in possession thereof when the sequestration issued, through their agents, J. B. Lafitte & Co.

On the thirty-first of January plaintiffs answered the intervention. In this answer they aver that Price, Hine & Tupper, J. B. Lafitte & Co., and Morton, Bliss & Co. were, at the date of the sale mentioned in their original petition, commercial partners, dealing in molasses on joint account; that the molasses sold by them to Price, Hine & Tupper was for account of this commercial partnership; that Morton, Bliss & Co. are liable, *in solido*, with Price, Hine & Tupper and J. B. Lafitte & Co. toward them for

the price thereof; that no delivery of the molasses was ever made by them (plaintiffs). And in this regard they substantially reiterate the allegations contained in their supplemental petition, from which we have already sufficiently drawn. They reconvene on Morton, Bliss & Co., and pray for judgment against them, *in solido*, for the full amount of the purchase price of the molasses.

Were Morton, Bliss & Co. commercial partners of Price, Hine & Tupper in December, 1872, and, as such, responsible for their commercial obligations toward Chaffraix & Agar in regard to the molasses purchased from them?

On the twenty-sixth of October, 1872, J. B. Lafitte & Co. wrote from New Orleans to Morton, Bliss & Co., at New York, the following letter:

"We have been speaking for some months past with Messrs. Price, Hine & Tupper about prime and choice molasses, and we would call your attention to the inclosed letter from their Mr. Tupper.

"Messrs. T. Tupper & Sons (father and brothers of the writer of the inclosed) were for nearly thirty years large receivers of sugar and molasses direct from the plantations of this State, and the writer recollects that Mr. Tupper mentioned, some four or five years since, that he had never known New Orleans molasses bought in December to fail to pay a handsome profit. The only grades to operate on are prime and above, as there is no loss from leakage, and those grades never ferment. The quantity produced of those grades during the two last seasons has been about forty thousand barrels each year. The advance has not been stimulated in any year by any attempt to control prices by buying up largely by one or two parties, but has been the natural result of the course of trade. We think by controlling one-half of the whole product an additional advance might be secured.

"Messrs. Price, Hine & Tupper stand very well in every respect, and are quite familiar with all the details of the business, as they have made sugar and molasses their specialty for a great many years.

"The proposition is to ship part of our purchases to New York, Philadelphia, Baltimore, and Charleston, and hold a part, say one-half, here. They can raise a portion of the amount needed, but as money is stringent here it would be impossible to carry so large a quantity in that way. If you will furnish the capital, we propose to allow you one-half of the profits upon the whole transaction, including the shipments as well as the portion held here. We would, of course, hold the warehouse receipts and keep it fully covered by insurance. The total amount needed would not exceed one hundred and fifty thousand dollars, if so much, and the greater portion would probably be needed for less than thirty days, and the whole transaction would certainly be closed within sixty or ninety days. We have been considering this matter ever since the writer's re-

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turn, and we feel fully convinced that it will pay a very handsome profit upon the investment.

"Please inform us as soon as possible if you are disposed to take hold of the matter."

The letter which Lafitte & Co. inclosed to Morton, Bliss & Co. was a letter directed by Tupper to Lafitte & Co., and refers in no manner to Morton, Bliss & Co. It appears, however, from the testimony of Hine, a witness for Morton, Bliss & Co., that negotiations had been pending between all the parties during the summer (Mr. Tupper representing Price, Hine & Tupper) in New York, the negotiations to be consummated by Mr. Lafitte in New Orleans.

To the letter from Lafitte Morton, Bliss & Co. answered by telegraph: "Consult French fully when you see him in regard to proposed molasses operation." French was an agent of Morton, Bliss & Co.

From the testimony of Hine and from the foregoing correspondence it results, we think, that a project had been started between Morton, Bliss & Co., Lafitte & Co., and Price, Hine & Tupper by which the parties were to operate in molasses here, the arrangements to be consummated by Lafitte. Their plans were arranged by Lafitte, as he tells us in his testimony, and the agreement and mode by which it was to be carried out is explained by him as follows:

"Price, Hine & Tupper were to buy the molasses in their own name. We (J. B. Lafitte & Co.) were not to be known in the transaction at all. When they bought the molasses, they were to put it in the sugar-shed in our name or ship it to New York in our name. When they handed us the receipts we were to pay them the money—the approximate amount—as soon as the bills should come in. It was at first expected that when the receipts came in the bills would come in; but of course the bills took a little time to make out, and, as I explained, the cash payments always enabled them to buy to better advantage. Upon giving me the receipts, I gave him the money. It was distinctly understood that I was always to hold the receipts. I explained to Mr. Tupper that Messrs. Morton, Bliss & Co. were willing that we should check on them without any security in their hands, but they always required that we should hold possession of the property before we paid for it. The understanding was that Price, Hine & Tupper were to charge us for the molasses, at the price they paid, and they were to charge in addition all expenses that they paid. They were to charge nothing for their services, but receive one-fourth of the profits as compensation for their services."

The examination then proceeds as follows:

"Question—Your house to receive another quarter, and Morton, Bliss & Co. one-half?"

"Answer—Yes, sir, for furnishing the capital."

"Question—Suppose there had been a loss, Mr. Lafitte, what was the understanding?"

"Answer—Each one should have borne his share, sir."

The agreement between the parties having been thus perfected, operations commenced and large transactions resulted.

It is out of one of the transactions carried on in conformity with this agreement that the present litigation springs. As we have seen Chaffraix & Agar sold to Price, Hine & Tupper seven hundred and eighty barrels molasses. The terms were cash. The price was not paid. Six hundred barrels were sequestered. It is not disputed that the molasses which was sequestered forms part of the molasses sold by Chaffraix & Agar to Price, Hine & Tupper. It was in the possession of Morton, Bliss & Co. when the sequestration issued. Morton, Bliss & Co. claim it as their property. Chaffraix & Agar claim that Morton, Bliss & Co. were the commercial partners of Price, Hine & Tupper, and responsible to them for the entire price of the molasses. They also claim a privilege upon the property.

We see nothing in the agreement or in the course of trade between these parties which made Morton, Bliss & Co. the partners of Price, Hine & Tupper.

Partnership is a contract made between two or more parties for the mutual participation in the profits which may accrue from property, credit, skill, or industry furnished in determined proportions by the parties. C. C. 2801. It is based upon the consent of the contracting parties. Here we see no consent on the part of Morton, Bliss & Co. to enter into a partnership with Price, Hine & Tupper. Their agreement was with J. B. Lafitte & Co. that they were to furnish Lafitte & Co. with the amount of money necessary to purchase a certain quantity and quality of molasses, the molasses to be selected by Price, Hine & Tupper, and to be paid for when the same should have been delivered to Morton, Bliss & Co. Here was no contract whatever between Morton, Bliss & Co. and Price, Hine & Tupper. Chaffraix & Agar sold to Price, Hine & Tupper. They had no dealings with Morton, Bliss & Co. Their property was delivered to Price, Hine & Tupper, and not to Morton, Bliss & Co. Price, Hine & Tupper delivered it to Lafitte & Co. for Morton, Bliss & Co., and received the money therefor. The title passed by delivery from Chaffraix & Agar to Price, Hine & Tupper, and from Price, Hine & Tupper, by delivery, to Morton, Bliss & Co. It was, therefore, Morton, Bliss & Co.'s property when it was sequestered.

But it is further contended that inasmuch as the profits and losses of such purchases of molasses as Price, Hine & Tupper should make were to be divided between Morton, Bliss & Co., Lafitte & Co., and Price, Hine & Tupper, therefore Morton, Bliss & Co. were the partners of Price,

Hine & Tupper, and bound for the debts contracted by them on account of such purchases. The participation in profits and losses is an element of partnership, but it does not, of itself, constitute a partnership in the sense that all the parties to such an agreement are commercial partners, and bound *in solido* each for the debts contracted by the other. If a party comes to me and says: "I think there is money to be made in the purchase of a certain grade of cotton; let me have the money with which to buy it, and we will share the losses or divide the profits;" and I give him the money required, this does not make me his commercial partner. If I give him the money, and he buys the cotton, but does not pay for it, I am not bound in his stead.

And this, it seems to us, is what Morton, Bliss & Co. did. They gave the money to Price, Hine & Tupper to pay for the molasses purchased by them, but they did not give it until the molasses had been put in their possession. And this was in conformity with their agreement. They were in no case to give the money until the property was in their possession and under their exclusive control. After delivery to them, Price Hine & Tupper had no interest in it further than the profit which it might make. This doctrine is well laid down, and the difference between partners and participations in profits, and explained by Bedaride in his treatise *Des Sociétés*, vol. 2, p. 274. He says:

"D'associé à associé obligation respective de se faire raison de l'achat et de la vente de la marchandise, de partager les bénéfices ou de contribuer à la perte dans les proportions convenues; en conséquence, action pour contraindre à rendre compte, à restituer la part des bénéfices ou à payer la perte. Donc, entre associés, il existait une société réelle et incontestable.

"Des participants aux tiers rien de ce qui résulte d'une société ordinaire. Notamment, absence complète d'obligations, et surtout de solidarité active ou passive. Ainsi le vendeur de la marchandise, ne connaissant que l'acheteur, ne pouvait demander qu'à lui seul le paiement du prix, n'intenter que contre lui toute autre action relative à l'existence, aux conditions du marché, à son exécution. De son côté, l'acheteur, n'ayant à faire qu'à son vendeur, et ne pouvant être actionné que par lui, se libérait valablement entre ses mains.

"En réalité, donc, dans ses rapports avec les tiers la participation ne constituait pas une société. Cette conséquence était surtout due à ce qu'elle n'en avait pas l'apparence. Chaque participant traitant en son nom et personnellement, les tiers ne pouvaient prétendre avoir été induits en erreur, ou avoir compté sur des garanties autres que celles offertes par celui avec qui ils avaient traité."

"*Maxima est differentia, inter socium et participem, et sic diversi in jure producuntur effectus, quorum præcipui sunt ut participes non tene-*

antur, nisi ad ratam capitalis pro quo participant in negotio. Neque ipsi agere possunt contra debitores societatis, neque conveniri valent a creditoribus." Casaregis, *Dix.* 39, Nos. 30, 31, 32.

"Contra participem nulla datur actio, neque interet regula ut obligatio contracta per socium official consocium. Creditori alia non datur actio, nisi obliqua ex persona propria ac directi debitoris, cujus dicitur legalis procurator, ejus que jura exercere potest, et pro ut ipsi debitori competunt; secus autem si non competat." Luca, *Dix.* 88, Nos. 4, 11.

And so in the case before us. Chaffraix & Agar sold their property to Price, Hine & Tupper. They did not know Morton, Bliss & Co. in the transaction; they had no dealings with them. The property had been transferred to Morton, Bliss & Co., who had paid their money for it, when it was sequestered. Morton, Bliss & Co. had it in their possession. It was not liable to seizure to pay Price, Hine & Tupper's debt.

It is a very hard case on the plaintiffs, for they have certainly been defrauded out of their property. But it must not be lost sight of that Chaffraix & Agar sold their property for cash, and allowed Price, Hine & Tupper to get possession of it without the cash being paid; that they did not record their privileges against it, and brought no suit to recover it until some eight days had elapsed after the sale. In the meanwhile, it had passed out of the possession of Price, Hine & Tupper, into the possession of Morton, Bliss & Co., who paid their money for it. Chaffraix & Agar can only recover now from Morton, Bliss & Co. upon the ground that they were commercial partners of Price, Hine & Tupper, and this, we think, they were not.

It is therefore ordered, adjudged, and decreed that, as regards Morton, Bliss & Co., the judgment of the district court be avoided, annulled, and reversed, and that there be judgment in their favor, and that the sequestration herein issued be set aside.

CONCURRING OPINION.

LUDELING, C. J. It appears J. B. Lafitte & Co. proposed to Morton, Bliss & Co. that if they would advance the money certain quantities of molasses could be bought to advantage; that Price, Hine & Tupper, experienced merchants, engaged in the business, could buy the molasses wanted, if the money was advanced, and that the money should be paid when the delivery of the molasses was made to Lafitte & Co. This seems to have been accepted by Morton, Bliss & Co., who furnished the money needed. To induce Price, Hine & Tupper to furnish the molasses, Lafitte & Co. agreed to give them one-quarter of the net profits over the price paid by Price, Hine & Tupper, and to advance the money, to be

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procured from Morton, Bliss & Co. The understanding and agreement of Morton, Bliss & Co. was that the transactions should be *for cash—their money was not to be paid until the molasses was delivered to their agents, Lafitte & Co.*, and it did not concern them from whom they purchased or on what terms. The molasses in this case was bought from Chaffraix & Agar, nominally for cash, but without requiring payment down; and it was subsequently delivered to Lafitte & Co. for Morton, Bliss & Co., *who paid the price to Price, Hine & Tupper.* I do not deem it necessary to decide whether there was or was not a second sale from Price, Hine & Tupper to Morton, Bliss & Co. It is certain Chaffraix & Agar sold to Price, Hine & Tupper, and that they, for and in consideration of the amount agreed to be paid by them, and received by them from Lafitte & Co. for Morton, Bliss & Co., transferred and delivered to the latter the molasses, with complete control over it, subject only to the contingent interest in the profits above mentioned. Price, Hine & Tupper were not the agents of Morton, Bliss & Co. The agreement was that when they should acquire molasses and deliver the same to the agents of Morton, Bliss & Co. the price paid, or agreed to be paid by them, should be given them by Morton, Bliss & Co., and that Price, Hine & Tupper should be entitled to one-fourth of the net profits.

I do not think this constituted either a partnership or an agency. Chaffraix & Agar claimed a privilege on the molasses for the price; their claim was not recorded, and as to third parties never had any effect.

I therefore concur in the decree rendered in this case.

DISSENTING OPINIONS.

HOWELL, J. Morton, Bliss & Co. were, in my opinion, either partners in the adventure, or Price, Hine & Tupper were their agents in making the purchase, and in either contingency Morton, Bliss & Co. are liable for the price of the molasses.

There is no evidence, as I understand it, of more than one sale—that made by plaintiffs to Price, Hine & Tupper. By virtue of that sale only the molasses passed to the possession of Morton, Bliss & Co., and in their possession, it is conceded, the property was sequestered.

Under such circumstances I think there can be no doubt that Morton, Bliss & Co., as well as the other parties, are liable to plaintiffs, who should be paid.

I therefore dissent.

WYLY, J. The facts and law of this case are correctly stated in the written opinion of the learned judge *a quo*, which I adopt as my dissenting opinion in this case. I will, besides, add a few observations. Un-

doubtedly there was a partnership between Morton, Bliss & Co. and J. B. Lafitte & Co. in the molasses speculation which they began in November, 1872, and which embraces the lot of molasses the price of which is now in controversy. Undoubtedly there was but one sale of the molasses in question, and Chaffraix & Agar were the vendors, who have not been paid. Undoubtedly they have a privilege upon the thing sold, without registry, provided the vendees have not sold and disposed of the same.

Now, the question arises, for whom was the purchase made by Price, Hine & Tupper? If it was made for the partnership between Morton, Bliss & Co. and John B. Lafitte & Co., and in their behalf, the vendors, Chaffraix & Agar, can certainly sequester the molasses and enforce the privilege for the price, whether they knew or not, at the time of the sale, that Price, Hine & Tupper were buying for said partnership.

That Price, Hine & Tupper bought this lot of molasses, as they had bought many lots before, for the partnership between Morton, Bliss & Co. and John B. Lafitte & Co., and were acting in their behalf, there can be no doubt. They were but fulfilling the agreement they had made with these parties, and in return for the value of their services in making the purchases it is proved they (Price, Hine & Tupper) were to receive one-fourth of the net profits of the speculation when all the shipments were finally sold by Morton, Bliss & Co.

Here the real purchaser, the partnership engaged in this molasses speculation, holds the thing sold and refuses to pay the price. It avails itself of the contract made by Price, Hine & Tupper to get possession of the property, and it repudiates the contract, or that part thereof imposing the duty to pay the price. It is no excuse that Price, Hine & Tupper, the employees of the partnership to buy the molasses, diverted the money intrusted to them and did not pay to plaintiffs the price of the molasses in question.

The partnership was contracted with the express understanding that Price, Hine & Tupper were to do the buying for it in their own name, for fear if it were known in the market that the wealthy firms of Morton, Bliss & Co. and John B. Lafitte & Co. were making these purchases of molasses to be shipped to New York on speculation the price of molasses would enhance, to their disadvantage.

Now, the instrument that the partnership chose to carry out its designs has failed to keep the plighted faith; it, the firm of Price, Hine & Tupper, has violated the agreement; it has wrongfully appropriated the money which it received and which it should have paid over to plaintiffs as the price of the molasses.

It seems to me if the partnership has been disappointed by the wrongful act of its employee, who has diverted its money and not paid the

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price, the loss should fall on itself, and not on Chaffraix & Agar. Certainly the vendee, the partnership, can not keep the molasses which it bought through Price, Hine & Tupper, and not pay the price. It can not hold up one part of the contract and say it is good and gives a title, and repudiate the other in regard to the payment of the price. Had the partnership engaged in this molasses speculation shown that Price, Hine & Tupper were not engaged in their employment in buying molasses, and that it bought the molasses in question from Price, Hine & Tupper just as it would from any other seller, of course the demand of plaintiffs in this case could not be maintained. But the record shows beyond doubt that the partnership was organized for the purpose of buying molasses on speculation, through Price, Hine & Tupper, and in the name of Price, Hine & Tupper. An important part of the contract was that all purchases made by the partnership should be in the name of Price, Hine & Tupper, for fear if it were known who the real purchaser was the price of molasses would go up. Viewing the contract out of which the partnership in question arose as an entirety, and considering the whole scope of the intentions and purposes of the parties, there can be no doubt that the molasses was purchased by the partnership, through Price, Hine & Tupper as parties interposed, and that there was in no sense a sale or conveyance from Price, Hine & Tupper to said partnership.

I therefore dissent in this case.

ON REHEARING.

The opinion of the court was delivered by

MANNING, C. J. This cause has been argued before us with great elaboration, with signal ability, and at exceptional length, and the numerous and exhaustive briefs filed by the counsel in this and other suits involving the same issues attest the importance of the principles of law now to be determined.

The statement of the facts and the transcription of the letter of J. B. Lafitte & Co. to the intervenors will appear in the opinion of the court read on the rendition of the judgment the rehearing of which was granted by our predecessors, and need not here be repeated.

If the agreement made by the three firms, conformably to the proposition of Lafitte & Co.'s letter and in accordance with its provisions, constituted a partnership, then the plaintiffs must have judgment against the intervenors for the amount of their demand. Otherwise, not.

It can not be denied that the question is not free from obscurity. A list of decisions of unexampled length and completeness has been re-

ferred to by the counsel of both parties, the plaintiffs and intervenors, and there is not only disagreement and conflict of authority upon the points involved, but a great dissimilarity of views among judges as to the signification to be applied to the language used by contracting parties. The distinction of Lord Eldon between a proportion of the profits and a sum equal to a given quantum of the profits, as affording the criterion of determining the question of partnership *vel non*, is too fanciful for practical use, but does not want supporters since his time.

There can be no dispute about the definition of a partnership under our law. The Code tells us that it is a synallagmatic and commutative contract made between two or more persons for the mutual participation in the profits which may accrue from property, credit, skill, or industry furnished in determined proportions by the parties. Civil Code, article 2772, new No. 2801. But there must be disputes, as frequent as the varying engagements of men in active business, as to whether particular contracts fall within that definition, and that is the gist of the present controversy. Price, Hine & Tupper were to buy molasses in their own name, and when they handed J. B. Lafitte & Co. the receipts the latter handed them the money, and the money was furnished by Morton, Bliss & Co. The Price firm were to charge the Lafitte firm for the molasses at the price they paid, with the addition of all expenses paid by them, but were to charge nothing for their services. The Price firm were to receive one-fourth of the profits, the Lafitte firm a like quantum, Morton, Bliss & Co. one-half. The plaintiffs insist that this agreement made the three firms *ipso facto* a commercial partnership. The intervenor denies that the agreement can be thus interpreted, and contends that it is a commercial adventure on joint account, of common occurrence in the centres of commerce, recognized by the laws of all countries, and likened to the *associations en participation* of France.

It is useful to consult the adjudications of courts of other countries, and particularly on questions of commercial law. It is true, as the plaintiff says, that the law of Louisiana must determine this controversy, but decisions of courts, as interpreting the language of commercial men in their transactions, must carry great weight.

The doctrine of *Waugh vs. Carver*, that a participation in the profits of a business does, of itself and by operation of law, constitute a partnership, and makes all participators liable to third persons, has been the fruitful source of discussion through all the succeeding cases. 2 H. BL. 235. Its authority is now overthrown. The editor of a late edition of *Story on Partnership* declares that after being disapproved by all text writers, reluctantly followed by courts, and broken in upon by subtle exceptions and limitations, the doctrine of that case has been finally overthrown in England. Sixth edit. sec. 49, note 2, by Gray. And another

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commentator on the same subject, after reviewing this case and others on similar points, concludes that the rule of *Waugh vs. Carver* is not established by the mass of either English or American authorities. *Parsons on Partnership*, 71, note 1.

It is to the later decisions of the English courts that we must look for the law of the present day. In 1860 it was held in *Nicholson vs. Ricketts*, sec. 105, Eng. Com. Law Reports, 496, 2 Ellis and Ellis, Q. B., that the transactions of the parties, although a partnership was created by them, did not bind the defendants. The case was this: The defendants, carrying on business as merchants in London, entered into a contract with Von Seutter & Co., merchants at Buenos Ayres, for the purpose of transacting exchange operations, the substance of which was that Von Seutter & Co. should periodically draw and sell at Buenos Ayres bills on the defendants, to be accepted by them, and should periodically remit other bills to the defendants to the same amount, to keep the defendants out of cash advanced; that the proceeds of these operations should be applied to the common purposes of the two firms, and that there should be a community of profit and loss between them. In the course of these transactions, Von Seutter & Co. drew certain bills on the defendants and sold them to the plaintiffs. The defendants refused to accept these bills when presented to them in London, and the plaintiffs thereupon brought the action against them, on the ground that the agreement and the community of profit and loss constituted the defendants partners with Von Seutter & Co., and so rendered them liable. Held—that the plaintiffs had no cause of action against the defendants. Lord Chief Justice Cockburn placed the decision on the ground of want of authority in Von Seutter & Co. to draw the bills, saying: "In ordinary cases of commercial partnership there is no need of express authority. * * In partnerships not strictly commercial, if it is obvious from the nature of the partnership, or from the particular purposes to which the bills are to be applied, that the drawing of bills is essential, there also the law implies an authority to each partner to draw them. But here there being no express authority to Von Seutter & Co. to draw so as to bind the defendants, but, on the contrary, an arrangement that the one firm should draw and the other accept, and that each should be bound so far only as their own signature was concerned, it seems to me no authority can be implied. The existence and the purposes of the partnership were unknown to the world. The principle therefore that where a partnership for particular purposes is held out to the world as existing, and it is reasonable to consider that drawing of bills is incidental to those purposes, one partner has an implied authority to bind the others by drawing bills, is here inapplicable."

It is assumed or admitted throughout the judgment then rendered

that a partnership was constituted under the circumstances stated, but the right of the Buenos Ayres member to bind the London member by drawing the bill was denied. It is apparent from this decision that when a partnership is created by operation of law, consequent upon a stipulation of participation in profits, it does not necessarily follow that the partners are unqualifiedly bound in the same manner and to the same extent as ordinary commercial partners.

Armstrong vs. Stokes, 7 Law Reports 598, Queen's Bench, is the latest expression (1872) of English judicial opinion upon the extent of the liability of parties under contracts similar to that under review. J. & O. Ryder & Co. were commission merchants at Manchester, carrying on business sometimes for themselves, and sometimes acting in pursuance of orders from their constituents. Plaintiff was a merchant at same place. On the fifteenth of June, 1871, plaintiff's salesman made a contract with Ryders' salesman for shirtings to be paid for thirty days after delivery. The goods were delivered on the twenty-fourth of July, and payment was therefore due on the twenty-third of August, but it was not made, and on the thirtieth of that month Ryders' house stopped payment. It was not pretended that the plaintiff knew before the thirtieth of August that the defendants had anything to do with the transaction, so as to afford evidence on the one hand that he had originally parted with the goods on the credit of the defendants, or on the other hand that he had elected to give credit to Ryders to the exclusion of defendants. But after the stoppage of J. & O. Ryder & Co. it was discovered from their books that in this case they had been acting as commission merchants for the defendants, and the plaintiff's case was that under the circumstances he was entitled to demand payment from the defendants as being undisclosed principals of the Ryders in the transaction. The evidence as to this was that the defendants are merchants at Liverpool, who had often before given orders to J. & O. Ryder for shirtings. There was no running account between the defendants and Ryders, but the defendants almost invariably paid cash on each transaction. The goods ordered in this case were sent on by Ryders on the second of August, with invoice containing the charges of the actual money that ought to have been paid to plaintiffs as the price of the goods, and of commissions, and on the eleventh of August, which was the first pay-day after the goods were received at Liverpool, the defendants with perfect *bona fides* paid Ryders the full sum.

Mr. Justice Blackburn in rendering judgment discussed several of the cases to which the brief of plaintiff's counsel has referred us, and reviews at unusual length the dicta of various judges in them, and thus sums up: "We think that if the rigid rule thus laid down were to be applied to those who were only discovered to be principals after they had fairly

paid the price to those whom the vendor believed to be the principals, and to whom alone the vendor gave credit, it would produce intolerable hardship. It may be said, perhaps truly, this is the consequence of that which might originally have been a mistake, in allowing the vendor to have recourse at all against one to whom he never gave credit, and that we ought not to establish an illogical exception in order to cure a fault in a rule. But we find an exception (more or less extensively expressed) always mentioned in the very cases that lay down the rule, and without deciding anything as to the case of a broker, who avowedly acts for a principal, and confining ourselves to the present case, which is one in which, to borrow Lord Tenterden's phrase in *Thompson vs. Davenport*, the plaintiff sold the goods to Ryder & Co., 'supposing at the time of the contract he was dealing with a principal,' we think such an exception is established. * * * We confine our decision to the case where the defendants, after the contract was made, and in consequence of it, *bona fide* and without moral blame, paid J. & O. Ryder, at a time when the plaintiff still gave credit to J. & O. Ryder, and knew of no one else. We think after that it was too late for the plaintiff to come upon the defendants."

But the conspicuous and special feature of the opinion, and the practically useful one to us just now, is the demonstration that the courts have all along imputed a controlling influence to the fact of payment by the undisclosed principal to his agent, the actual purchaser, before the seller knew there was any one interested in the transaction but himself and his vendee. As early as 1804 the doctrine urged upon our acceptance by plaintiffs' counsel was so far modified that Lord Mansfield held, if the undisclosed principal had really paid the actual purchaser he would not be liable to pay over again, if it would have been unfair to make him do so. The dictum of Lord Ellenborough in *Kymer vs. Suwereropp*, 1 Camp. 109, relied on by plaintiffs in their brief, is explained by the fact that the persons employed were brokers, who always have a principal, and the vendor knows in that case there is or ought to be a principal between whom and himself is established a privity of contract, and the principal also knows that the vendor is aware of this, and to some extent trusts his liability. Lord Tenterden in a later case (*Thompson vs. Davenport*, 9 B. and C. 86-8) said: "I take it to be a general rule that if a person sells goods, supposing that at the time of the contract he is dealing with a principal, but afterward discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, he may recover the amount from the real principal, subject, however, to this qualification, that the state of account between his principal and his agent is not altered to the prejudice of the principal."

And Maule, J., in a yet later case refers to these dicta of the judges approvingly, saying they afford a sensible rule on the subject. Making the application to the case before us, there is no dispute as to the fact that Morton, Bliss & Co., through J. B. Lafitte & Co., had paid Price. Hine & Tupper for the molasses sold to the latter by the plaintiffs the instant of delivery, and to make them pay over again would produce the intolerable hardship described and deprecated in the opinion from which we have been quoting.

We are warned by the earnest words addressed to our predecessors by the plaintiffs' counsel when a rehearing was prayed, of the fateful consequences that will attend or follow the enunciation of this doctrine:

"If this be the law, we may expect that all large and wealthy speculators will hereafter make their purchases through some irresponsible party. In all large commercial operations involving risk and responsibility capitalists will never be known as parties concerned. By screening themselves behind some irresponsible name they take the profit, if any, and avoid all liability in case of loss."

The eminent judge who rendered the decision last quoted is too acute not to have foreseen such consequences if they would necessarily follow from the doctrine thus formally recognized. His country is pre-eminently a commercial one. His comprehensive learning and large experience pointed him out as one of the two judges who have in the last year been elevated to the peerage under a change in the English constitution, made on that occasion, and expressly in order to obtain his judicial assistance in the hearing of cases before the House of Lords.

Lord Blackburn thus opens to our view other inconveniences which would follow the approval of the doctrine maintained by plaintiffs' counsel: "The great inconvenience that would result if there were privity of contract established between the foreign constituents of a commission merchant and the home suppliers of the goods has led to a course of business in consequence of which it has long been settled that a foreign constituent does not give the commission merchant any authority to pledge his credit to those from whom the commissioner buys them by his order and on his account. It is true that this was originally (and in strictness perhaps still is) a question of fact, but the inconvenience of holding that privity of contract was established between a Liverpool merchant and the grower of every bale of cotton which is forwarded to him in consequence of his order to a commission merchant at New Orleans is so obvious and well known that we are justified in treating it as matter of law, and saying that in the absence of an express authority to that effect the commission merchant can not pledge his foreign constituent's credit." *Law Rep.*, 7 Q. B., p. 605.

There is less ambiguity in the French authorities than in the English,

but there are textual provisions in the Code of Commerce of France (Code de Com., articles 47 to 50) that expressly legalize and define *associations en participation*, or commercial adventures on joint account. Savary thus defines them:

"Elle s'appelle ainsi parcequ'elle est sans nom, et qu'elle n'est connue de personne, comme n'important en façon quelconque au public; tout ce qui se fait en la négociation, tant en l'achât qu'en la vente des marchandises, ne regarde que les associés chacun en droit soi; de sorte que celui des associés qui achète est celui qui oblige et qui paye au vendeur; celui qui vend reçoit de l'acheteur: ils ne s'obligent point tous deux ensemble envers une tierce personne; il n'y a que celui qui agit qui est le seul obligé; ils le sont seulement réciproquement l'un envers l'autre en ce qui concerne cette société."

Pothier's definition is more concise: "Celle par laquelle deux ou plusieurs personnes conviennent d'être de part dans une certaine négociation qui sera faite par l'une d'entre elles en son nom seul." *Contrat de Société*, p. 61. Pardessus explains the difference between partnerships and these associations: "La différence entre les sociétés et entre les associations est importante relativement aux actions des tiers. S'ils font la preuve d'une société collective, les engagements contractés par l'un des associés obligent solidairement les autres, puisque nous avons vu que le défaut d'acte social ou de publicité donnée à ses clauses ne pouvait être opposé aux tiers." *Droit Commercial*, tome 4, No. 1047. Massé sums up his discussion by saying: "Or, si l'on consulte les anciens auteurs, tant de l'école italienne que de l'école française, on les trouve tous unanimes sur ce point, que l'association en participation ne constitue pas un corps moral dans lequel se confondrait la personne des participants." *Droit Commercial*, tome 3, p. 483.

Rivière's definition is concise, and perfectly describes a commercial adventure on joint account: "Elle a toujours pour objet une entreprise particulière * * l'opération terminée, la société est dissoute." *Répétitions Ecrites sur le Code de Commerce*, 125. It is true, these juriconsults are treating of an association legalized by the commercial code of their country, but that code only defined and formulated a contract which had long been recognized by the *lex mercatoria* common to all countries, and hence their commentaries upon such a contract or agreement for an adventure are not inutile in enabling us to understand the nature, effect, and attributes of such an agreement.

It is conceded, however, that neither English nor French authorities will warrant us in construing an agreement by their rules, if our own law, as interpreted by our own courts, imposes a different rule. In *Mil-laudon's case*, this court settled conclusively that the laws and usages of commerce to which reference is to be had by our tribunals in interpreting

commercial contracts are those sanctioned by the law merchant of the United States, and explained and adjudicated by the Supreme Court. *McDonald vs. Millaudon*, 5 La. 403. That court held the following language in discussing the principles and extent of the English decisions in *Grace vs. Smith* and *Waugh vs. Carver*: "Actual partnership, as between a creditor and the dormant partner, is considered by the law to subsist where there has been a participation in the profits. * * * That rule, however, has no application whatever to a case of service or special agency where the employee has no power as a partner in the firm and no interest in the profits as property, but is simply employed as a servant or special agent, and is to receive a given sum out of the profits, or a proportion of the same, as a compensation for his services." *Berthold vs. Goldsmith*, 24 How. 542. And in that opinion the court quote with approbation the case of *Hallet vs. Desban*, decided by this court, and say that the facts of different cases approach so near to each other that the difference between them is apparently unsubstantial, but a distinction does exist, and the only difficulty is in the application of the principle on which that distinction rests.

The same question came before that court later, when it was insisted that the contract under review made the parties copartners. The language of the court upon that point was imperative and incisive, and excludes the idea of doubt: "We can not adopt that view of the subject. The adjudications which bear upon it are conflicting and irreconcilable. The case of *Berthold vs. Goldsmith* is conclusive in this forum against the proposition." *Seymour vs. Freer*, 8 Wal. 215.

We are asked to review the decisions of this court, and the counsel for plaintiffs equally with the counsel for the intervenors insist that its decisions upon the question of partnership are favorable to the views advocated by each. The review thus desired has already been made in the case quoted by the Supreme Court of the United States. The two opinions rendered then, and published in the Fourteenth Annual, discuss, analyze, and dissect all the previous cases from the *Millaudon* case down to the date of that judgment (*Hallet vs. Desban*, 14 An. 529), and the court, after a full and exhaustive study and presentation of the question in all its aspects, as affected by the textual provisions of our Code, by the decisions of our court upon them, and by the decisions of courts of sister States and of the United States upon the question of commercial law involved, decided definitively that a community of profits is the criterion by which to determine the contract of partnership: but to render a party liable as a partner, he must share as principal, and not as mere agent, factor, or servant.

We have been referred to *Leggett vs. Hyde*, 58 N. Y. Rep. 272, decided in New York, and *Brigham vs. Clark*, 100 Mass. 430, in Massachusetts,

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as confirmatory of plaintiffs' construction of the agreement in this case. The agreement in the latter case is wholly unlike the present, and the ruling can not be considered applicable, but the New-York court distinctly affirms that the rule in *Grace vs. Smith* and *Waugh vs. Carver* has been exploded in England, simply because Parliament interfered and changed the law since the law as laid down in those cases was found objectionable, and hence we must be governed by it here (N. Y.) until the Legislature shall see fit to abrogate it as it did in England. But in a previous part of the same opinion the learned judge who was the organ of the court informs us that there has been and is a legislative and practical recognition of the doctrine of *Waugh vs. Carver*, as a rule of commercial law, in the State of New York, in the limited partnership act. And so, there being statutory provision for the retention and consecration of this rule there, it is not surprising that the rule is adhered to by that court.

Indeed, as you advance in the examination of this question, and trace its history and development in the various decisions of the courts, it will be seen that in the effort to escape the manifest wrong that would be inflicted by applying inflexibly the rule that any participation in the profits necessarily creates a partnership the courts encroached on that doctrine stealthily, and permitted the circumstances of each case to control the rule. The effort to apply the rule without qualification was gradually abandoned, and then arose conflicting dicta which have introduced more perplexity and confusion in the treatment of this question than any other known to the commercial law. It is not too much to say that a superabundance of authorities is accessible to the disputant for either proposition, and that the distinction finally drawn by the judges from the circumstances of the cases before them will sometimes exhibit a court in apparent contradiction to itself upon the application of the rule to those circumstances.

The general principles we educe from this discussion, and which we consider control the present case, are, that a community of interest is the basis of every partnership; but it is not correct to say that every community of interest necessarily constitutes the relation of partnership. Participation in the profits will ordinarily establish the existence of a partnership, in the absence of all other opposing circumstances, between the participators in favor of third persons, but does not necessarily produce that effect. The fact that there is participation is presumptive proof that there is a partnership, but, like all presumptions, is liable to be overcome by circumstances. The rule does not outweigh or overcome or demolish the circumstances, but the circumstances control the rule, and can repel the presumption created by it. The foundation of the rule is manifestly artificial. In adjusting it to the circumstances of

each case you do not dislocate any part of the legal edifice erected upon it, but adapt each of them to the other so as to produce symmetry. The circumstances of each case must guide the court, and if in considering them the participation in the profits is clearly shown to be in the character of an agent or employee, the presumption of partnership is repelled.

In the case before us, the Price firm were to use their skill in purchasing the molasses advantageously, and no money was to be paid and no money was paid to them until the molasses was delivered to the Lafitte firm, who received it for Morton, Bliss & Co. and paid Morton, Bliss & Co.'s money for it. This shows the nature of the employment. In our opinion, when Lafitte & Co. received the molasses, and paid for it, it became the property of Morton, Bliss & Co., and the plaintiffs could have recourse upon no one for its price but their vendees, to whom they sold for cash, and of their own accord waived a rigid compliance by their vendees with the conditions of sale. They must bear the consequences of their own act. They gave credit to the Price firm alone. Their recourse is upon it alone.

It is therefore ordered and decreed that the judgment and decree of this court heretofore rendered remain unaltered.

No. 6528.

E. MARQUEZE & Co. vs. C. O. LeBLANC. SUN MUTUAL INSURANCE COMPANY,
GARNISHEES.

29	194
50	57
29	194
52	804

29	194
122	415

A party domiciled out of the jurisdiction of a court may be made a garnishee, under a writ of *attachment*, but not under a writ of *feri facias* issued by that court. In cases of *feri facias*, the garnishment process must issue from the court of the garnishee's domicile.

A party may be sued, and judgment rendered for, or against him, by a competent court, other than that of his domicile, if he appear in such court and plead to the merits.

APPEAL from the Fifteenth Judicial District Court, parish of Lafourche. *Beattie, J.*

Thomas A. Badeaur and Isaiah D. Moore, for plaintiffs and appellants.
Leovy & Kruttschnitt, for garnishees.

The opinion of the court was delivered by

DE BLANC, J. The defendant, C. O. Le Blanc, is a resident of the parish of Lafourche. Plaintiff brought suit against him in the court of his residence, and obtained from said court an attachment against his property. Under the impression, as they were, that the Sun Mutual Insurance Company and Herrmann & Vignes, of the city of New Orleans, have in their possession property and effects belonging to their debtor, plaintiff

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had them cited as garnishees, to appear before the court in the parish of Lafourche, and there answer the interrogatories propounded to them.

In obedience to said citation, the garnishees appeared before said court, and, so far as we can judge from the order in which the documents are classed in the transcript, first filed their answer to the interrogatories, and on the same day the Sun Mutual Insurance Company filed an exception declining the jurisdiction of the Lafourche court, on the ground that its domicile is in the city of New Orleans.

If our impression is correct, if we are not mistaken as to the time when and the order in which these answers and exception were filed, the exception can not be maintained, for it followed instead of preceding the only answer which a garnishee is allowed to make. In so doing, the insurance company submitted to and accepted the jurisdiction of the court before which it appeared. C. P., art. 93.

Were it otherwise—had the exception been filed before the answer—would it have sustained the garnishee's pretensions, and justified the dismissal—not of a suit—but of mere interrogatories propounded to that party? We believe not. And why? Because a garnishee is but "a stakeholder, a custodian of the property attached in his hands; he has no pecuniary interest in the matter, no costs to pay, none to save; his business is to let the law take its course between the litigants." 14 An. 373; 18 An. 476. He can not contest or even answer the demand of plaintiff against defendant; he can, legally, answer but the interrogatories propounded to him.

In this case, the insurance company relies on articles 89 and 162 of the Code of Practice, which provide, one, that the defendant—not the garnishee—shall be cited at his domicile; the other, that no domicile shall be elected for the purpose of being sued elsewhere than in the parish of one's residence. Is there in those articles a single expression prohibiting any litigant from submitting to and accepting the jurisdiction of a competent court? The law prohibits nothing more than an agreement entered into, in and by which one consents, in advance and before the institution of a suit, to be sued elsewhere than at the domicile mentioned in the Code. 2 L. R. —; 18 An. 88.

The articles relied upon by appellee do not conflict with or repeal article ninety-three of the Code of Practice, which provides "that if one be cited before a judge whose jurisdiction does not extend to the parish of his domicile or usual residence, but who is competent to decide the cause brought before him, and he pleads to the merits, instead of declining the jurisdiction, the judgment given shall be valid, except defendant be a minor. Did the insurance company appear in the court, the jurisdiction of which is now contested? Did it file its answer in said court? Is and was that court competent? This is not and can not be disputed.

If incorporated in one general provision, articles 89, 162, and 93 could not be made to clash. The first part of the general provision composed of those three articles would establish the general rule that a defendant must be sued at his domicile; the second part would confirm that rule and prohibit any agreement to be sued elsewhere than at said domicile; the third would place it in the power of parties to accept or decline jurisdiction, to waive or enforce a personal privilege, to reduce or multiply litigation. That privilege, however, is one that only defendants can claim and exercise, and does not extend to garnishees, who are but stakeholders and custodians.

If there had been any intention of repealing article ninety-three of the Code of Practice, would it have been retained in the revised edition, and in every edition published since 1861? What was the object of the law amendatory of the one hundred and sixty-second article of the Code of Practice? Was it to protect defendants, to give them a right which then they had not? It was not, for before the adoption of that law they could agree or refuse to be sued out of the parish of their residence? That law did not add to their right, had no reference to them, and was passed to protect the home creditor against the effects of an election of domicile, which had become the invariable condition of nearly every contract entered into beyond the limits of the debtor's parish.

In the case of Charles E. Alter vs. J. B. Pickett, reported in the twenty-fourth Annual, and that of Benjamin L. Harrison vs. Carondelet Street and Carrollton Railroad Company, not yet reported, the court said "that the garnishee is not bound to go beyond the court of his own jurisdiction to answer interrogatories." And why? Because, as under article 642 of the Code of Practice "the seizure of rights and effects can be made but in the parish where they are held, it would seem that the garnishment process should be issued by a court of the same parish." In support of that opinion, they refer to the case of A. Rochereau & Co., 24 An. 311.

In the case there referred to, what were the facts? Plaintiffs sued defendant, a resident of the parish of St. James, in one of the courts of this city, and, from that court, obtained an order of attachment and garnishment. Defendant excepted to the jurisdiction of the New Orleans court, on the ground that he was a resident of the parish of St. James. The lower court decided that it had no jurisdiction of the defendant, but that it had jurisdiction of the property attached. On appeal, the Supreme Court reversed that judgment, dismissed the attachment, and, for so deciding, alleged that the conservatory remedy should have been issued by the court of the debtor's residence.

In another case, the Slaughter-House Company (a corporation created by act of the General Assembly) being cited as a garnishee, filed the ex-

ception that it was subject to no other jurisdiction but that of the Superior District Court; that, as to it, every other court in the State was divested of jurisdiction. What did this court answer? That may be true as regards original process, but it does not hold when the company is made garnishee. The court which rendered the judgment out of which springs the garnishment process necessarily has jurisdiction over the party made garnishee. 26 An. 531.

Article 250 of the Code of Practice provides "that a garnishee may be made a party to the suit, and be cited to answer interrogatories on facts and articles, either by praying to that effect in the original petition, or by a supplemental petition filed at any stage of the suit previous to judgment. Is it not manifest, from every word of that article, that the process by garnishment is a branch, an incident, a material part of the original suit—a part which one can see and touch—and that the original suit, its incidents, its branches, are subject to one and the same jurisdiction? C. P. 154.

When an attachment is obtained before judgment, to what suit can the garnishee be made a party? Is it to a separate suit to be instituted against him? If so, how vain it was to declare that he can be made a party to a proceeding against him, how extravagant to insist that interrogatories may be attached to the plaintiff's original petition or to a supplement. Why attach them to a petition deposited in the court of defendant's domicile, if they are to be filed, answered, traversed, and passed upon in another jurisdiction and by the court of the garnishee's domicile?

We repeat it, the garnishee is at most a qualified defendant. The articles, therefore, which relate to defendants, to actions against them, do not and can not legally be made to apply to a garnishee. The latter is cited as a witness; he is called upon, not to answer to a demand against him, but merely to disclose whether he has property and effects belonging to the real and only defendant in the case. Judgment, we admit, can be rendered against him, but how and under what circumstances? As a penalty, not otherwise, when he refuses or neglects to answer, or, when answering, he swears falsely, and thereby justifies the presumption that he is in possession of the property attached.

Any other construction would lead to the irrational conclusion that the execution of a judgment may be denied to the court by which it was rendered and confided to every other court in the State, and this in disregard of the article of our Code which provides "that the execution of judgments belongs to the courts by which the causes have been tried in the first instance." C. P. 617.

If the power to execute can be wrested from the court which heard and decided, and transferred to and distributed among the other courts,

how and by what criterion determine the jurisdiction in which to proceed against the garnishee? Shall it be by the amount claimed by plaintiff against defendant, or the amount due by the garnishee to defendant? These difficulties may be avoided by a strict interpretation of the articles referred to. They are plain and just; they are not repugnant to any existing law; they do not impose on the garnishee any unreasonable burden; he can, without leaving his domicile, answer the interrogatories propounded to him, and—if his answers be honest and true—he has nothing to apprehend, no expense to incur, no costs to pay. Why, then, compel the creditor to resort to a multiplicity of actions, and to often spend more than he can realize?

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be and it is hereby annulled, avoided, and reversed, and appellee's exception overruled and set aside.

It is further ordered, adjudged, and decreed that this case be remanded to the lower court to be proceeded in according to law, and that appellee, the Sun Mutual Insurance Company, pay the costs of the appeal.

CONCURRING OPINIONS.

MANNING, C. J. A distinction must be made, *quoad* the question of jurisdiction, between the process of garnishment issued after judgment against the original debtor and that issued before judgment. I say *must* be made, because the decisions countenance it, and by such distinction alone can they be harmonized.

In Featherston vs. Compton, 3 An. 380, judgment having been obtained against the defendant at his domicile in Concordia parish, and a writ of *feri facias* issued to the sheriff of Orleans, plaintiff presented a petition to one of the courts of this city praying garnishment of Kendall, who resided here. Exception made to the jurisdiction of the Orleans court on ground that Concordia court alone could take cognizance of the garnishment. Held—That Orleans court had jurisdiction because it was the domicile of the garnishee.

In Alter vs. Pickett, 24 An. 513, after judgment obtained against Cummings in the court of Orleans, his domicile, the same court issued garnishment process against Pickett, whose domicile was Bossier parish, and rendered judgment against her. Held—That the judgment was null, because the court of her domicile (Bossier) had alone jurisdiction. These two cases, separated by an interval of a quarter of a century, affirm the same doctrine, viz.: that garnishment process, ancillary to the execution of a judgment, must issue from the court of garnishee's domicile, and requires a *feri facias* to support it. And it has very lately

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been repeated in *Harrison vs. Carondelet-Street-Railroad Company*, decided in November, 1876. Opinion Book 45, p. 584. I am not disposed to depart from a rule that has been the guide of the profession so long.

In *Rochereau vs. Guidry*, 24 An. 311, the defendant, a resident of St. James parish, was sued in Orleans for rent, and an attachment issued against funds in hands of garnishee in Orleans. Held—That the Orleans court had no jurisdiction, the defendant being amenable alone to the court of his domicile *quoad* the suit for rent, and the attachment, being a conservatory remedy merely, and accessory to the suit, can be issued by no other than the court having jurisdiction of the suit.

In *Bradley vs. Woodruff*, 26 An. 299, the defendant was a resident of St. Bernard, and was sued in Orleans, on an account for supplies, and a sequestration of cotton, found in Orleans, was made. On exception to the jurisdiction, held—The court of Orleans had no jurisdiction of the suit for supplies against a resident of St. Bernard, and, being without jurisdiction, could not legally make the order of sequestration, incident to the suit.

In *Guyol vs. Duggan*, *idem*, 529, the defendant's domicile was East Baton Rouge, and he was sued in Orleans on an account for supplies, and his cotton in the latter place was sequestered. The court *ex mero motu* noticed the want of jurisdiction, and held as in the last case.

In *Gay vs. Eaton*, 27 An. 166, the doctrine of the previous cases is reaffirmed; *i. e.*, whenever the writ of attachment, or other conservatory remedy, is resorted to in aid of the main action, and for the purpose of holding funds or property to answer a judgment not yet obtained, the court of the domicile of the defendant in the main action alone has jurisdiction both of the main action and of its auxiliary conservatory remedy.

This dictum is reconcilable with that of the first three cases above recited. If we hold that process of garnishment must in all cases and under all circumstances issue from the court of the garnishee's domicile, we overrule all of these last-quoted decisions. If we hold that such process must always issue from the court that has jurisdiction of the main action, we overrule the *Featherston*, *Alter*, and *Harrison* cases. In my opinion it is neither necessary nor proper to do either. Nor do I propose to make a new law under the guise of a judicial construction, but merely to harmonize the expositions of law already made. It will be observed these two currents of authorities flow along in parallel beds. There is one other decision, *Smith vs. Durbridge*, 26 An. 531, in which it is said, the court which rendered the judgment out of which the garnishment process springs necessarily has jurisdiction over the party made garnishee. This is not true in all cases, as *Alter's* case and its predecessor and successor rule the contrary. It would be more exact

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to say, the court which has jurisdiction of the original suit to which the garnishment process is an auxiliary set in motion before judgment necessarily has jurisdiction over the party made garnishee.

The garnishee's counsel contends that the rule is inflexible, that a party must be sued at his domicile, and since 1861 can not even elect to be sued elsewhere, and as *Delacroix vs. Hart*, 24 An. 141, characterized the garnishment process as a suit, wherein there must be petition and citation, it follows that the garnishee can only be held to answer process from the court of his domicile.

That is the reason why, after judgment obtained, the court of the original suit has not jurisdiction of the garnishment, if it be not the garnishee's domicile. The suit between the original parties is at an end. The judgment terminated it. If the plaintiff then wishes to proceed against a garnishee, he must sue him by petition and citation, and in the court of his domicile. Thus said this court from 1848 to 1876.

But if the process of garnishment is but an accessory to the main action, having its origin at the same time, and serving as an anchor to hold fast the fund or property which will satisfy the judgment until that judgment can be obtained and is ready to be satisfied, then by virtue of the law requiring a defendant to be sued at his domicile the suit must be brought there, and since it is only that court that can hear the suit, so it is only that court that can issue the conservatory remedies that accompany the suit. That is the ruling of this court down to the *Gay* case in the last Annual.

I therefore concur in the decree reversing the judgment of the lower court and remanding the cause for further proceedings against the garnishee in the district court of *LaFourche*.

SPENCER, J. I concur in the opinions of Justice DeBlanc and of the Chief Justice.

DISSENTING OPINION.

MARR, J. I see no reason for any distinction in the proceeding in garnishment under a writ of *feri facias* and under a writ of attachment; and I can not concur in the conclusions of the court.

In garnishment under a *feri facias* the law is well settled that where the person to be made garnishee resides in a parish different from that in which the judgment has been obtained the writ is directed to the sheriff of the parish in which the garnishee resides; and the judgment creditor applies to the proper court of that parish and causes the citation in garnishment to issue and to be served by the sheriff of that parish. The garnishee files his answers in that court, and all the issues

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between the garnishee and the judgment creditor are heard and determined in that court. See *Featherston vs. Compton*, 3 An. 380.

In cases of attachment the writ must be sent to the parish in which the property to be attached is found, and this is true whether real or movable property or some incorporeal right is to be attached. *Favrot vs. Delle Plane*, 4 An. 584. In this case the attaching creditor desired to attach rights and credits in the parish of Orleans, and he properly prayed for a writ of attachment to be directed to the sheriff of the parish of Orleans; but the citation in garnishment required the garnishees to answer in the parish of Lafourche, where the suit was brought.

It can make no difference that the garnishment in attachment is on mesne process, before judgment, because no judgment can be rendered against the garnishee until judgment has been obtained against the debtor, the defendant in the same action.

The law intends to restrict the jurisdiction of the court *ratione personæ* to the territorial limits of their respective parishes (Rev. C. P., articles 162-229), and the exceptions to this are few, and are defined in articles 163, 164, etc. See, also, *Alter vs. Pickett*, 24 An., and cases there cited.

It was plainly the intention of the Legislature to deprive the courts of jurisdiction of actions against persons having their domicile in other parishes than that in which each court exercises its powers and functions, and to abolish all distinctions between a court of jurisdiction *ratione materiæ* and *ratione personæ*. In either case the judgment is void, and no consent can give jurisdiction where it does not exist without consent.

As in garnishment under *feri facias*, so in garnishment under attachment. The writ must be directed to the sheriff of the parish in which the seizure is to be made, and if a garnishee residing in that parish is to be cited, application, in my opinion, must be made to the proper court of that parish, citation in garnishment issued by that court, and served by the sheriff of that parish holding the writ. The garnishee should file his answers in that court, and in that court all the issues and controversy between the seizing creditor and garnishee will be made up and determined.

The creditor will proceed against his debtor in the court having jurisdiction of the main action, the suit between the plaintiff and defendant; and when he has obtained judgment the court of the domicile of the garnishee will pass upon garnishment and condemn the garnishee to pay if his answers and the proceedings in garnishment establish his liability.

In many cases of garnishment there are serious questions to be determined between the garnishee and the seizing creditor, and it would be very inconvenient, vexatious, to require the garnishee to go out of his own parish, it may be to one quite distant, to litigate these questions. In

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this very case the answers of the garnishees disclose the fact that a transfer had been made by the defendant and accepted long before the institution of the suit. These answers may be traversed, and it will be necessary before condemning the garnishees to show a state of fact different from that shown by the answers, to attack the alleged transfer and to show that it did not place the right attached beyond the reach of the attachment. This would compel the garnishees to go out of their parish to litigate these issues, and would subject them to all the inconveniences which the law has sought to obviate by requiring suits and proceedings against the citizens of the State to be brought and prosecuted in the courts of the parish in which they have their domicile.

I think the district court of Lafourche was absolutely without jurisdiction as to the garnishees residing in the parish of Orleans, and that this want of jurisdiction *ratione personæ* under the existing law may be shown at any time, and that whenever the objection is made it is equally as fatal as the want of jurisdiction *ratione materiæ*.

ON APPLICATION FOR REHEARING.

The opinion of the court was delivered by

EGAN, J. The interest and importance in practice of the questions raised in this case, which have been again pressed with great earnestness upon the attention of the court in the application for rehearing, have induced us to give it an unusually careful consideration.

It is urged that the garnishee domiciled in New Orleans can not be called to answer before the district court of Lafourche parish, the domicile of the defendant, LeBlanc, from which court the process of garnishment issued in obedience to the prayer of the original petition in the cause. It is also argued that this court has decided that a garnishee under process issued in execution of judgment must be cited to appear and answer before the court of his own domicile, which alone has jurisdiction to hear and adjudge the question of his liability, and that there is no reason for a distinction between proceedings in garnishment *before* and *after* judgment.

Were this suit directly and mainly against the garnishees as principal defendants, the question as to exception of domicile would not bear discussion, since the act of 1861 and the decisions under it and the general provisions of the Code of Practice in regard to jurisdiction *ratione personæ* within the exceptions to which, enumerated in the Code, we are told that this case does not come. In support of this view we are referred to the case of *Delacroix vs. Hart, Barrow, garnishee*, 24 An. 141, in which Chief Justice Ludeling, the organ of the court, said: "The gar-

nishment process is certainly a suit; there must be a petition and citation to get the garnishee before the court, and then follows a judgment in accordance with the evidence." This case was one of garnishment under *fi-ri facias* after judgment had terminated the suit between the original parties. In other words, like the case of *Alter vs. Pickett*, reported in the same volume, and the third Annual case referred to, it was simply a matter of execution of judgment already obtained, in regard to which the original defendant was entitled to nothing but notice of seizure, which he could no more contest than he could that of tangible property, and where neither petition nor citation were required to be served on the original defendant. In the case of *Elder vs. Rogers*, 11 An. 606, the court held, Mr. Justice Spofford being the organ, that the judgment debtor was not a necessary party, and refused to dismiss the appeal on motion of the garnishees, for want of citation, to him. The universal practice in garnishment under *fi-ri facias* has, it is believed, been in accordance with this view, and it would seem to be clear that such is the law governing this as any other mode of executing judgments. Judgment being rendered, the *contestatio lites* is over. You can no longer after judgment make the garnishee "a party to the suit," as expressly authorized by the Code of Practice (article 250) "*at any time before judgment*;" all that can be done is to seize and condemn, in the hands of the garnishee, the debt due by him to the judgment debtor. This is done by *fi-ri facias* issued to and executed in his parish, where the debt, the thing seized, is found, and there is no reason or propriety in calling him before another jurisdiction. This would seem to furnish a very good reason for distinction between proceedings in garnishment before and after judgment. In the former case the original debtor is a necessary party, without judgment first against whom none can go against the garnishee; in the latter case the original debtor is not a necessary party to what Judge Ludeling calls "the suit" between the plaintiff and the garnishee, which has been held, and we think correctly, to be governed as to the matter of jurisdiction *ratione personæ* by the general provisions as to domicile, "*cessante ratione cessa ipsa lex*." It seems to be conceded that the writ of attachment may lawfully issue from the court having jurisdiction *ratione personæ* of the principal debtor; but it is said that the proceedings subsequent to seizure in the hands of the garnishee must be had before the court of his domicile, and, of course, must await judgment against the defendant. This is an admission that the cause is the same, as the attachment is but process in the cause. This is in direct contravention of article ninety-four of the Code of Practice, which provides that "the same cause can not be brought before two separate courts, though they be possessed of concurrent jurisdiction, except by discontinuing the first suit brought before the answer is filed,"

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and that the judge before whom it is first brought shall sustain his jurisdiction, and the defendant may have the cause dismissed by the other court and recover costs.

Again, in the proceeding by attachment and garnishment before judgment the principal defendant is a necessary party, who is entitled to contest and be heard at every stage of the cause, and, besides the great inconvenience and expense in practice of this course of proceeding, we are met at once by the same difficulty of jurisdiction as to the defendant which is here set up by the garnishees as to themselves and without any provision of law to warrant it; *i. e.*, you must require the defendant to appear and contest before the court, not of his jurisdiction, but that of the garnishee. The difficulties in the way of this mode of proceeding are apparent.

In *Rochereau vs. Guidry*, 24 An. 311, the court below held that it had no jurisdiction of the defendant, because his domicile was in another parish, but that it had jurisdiction of the thing attached, and would hold it subject to the order of the court having jurisdiction of the person of the defendant. The Supreme Court held "that the court which issued the attachment was without jurisdiction to grant any order binding on the defendant, because his domicile was in another parish, and that the attachment, being merely a conservatory remedy, should have been issued by the court having jurisdiction of the case."

In *Gay vs. Eaton & Barstow*, 27 An. 166, the court says: "A court which can not determine *whether or not a debt exists* can not pass on the question of privilege" to secure its payment. This mode of proceeding must be discarded. Now, there are many cases in which persons other than the plaintiff and defendant are parties to a suit "only incidentally and subsidiarily." C. P., article 101. Such are garnishees under attachment against a debtor who has a domicile in the State where the law requires that suit against him shall be brought. The exceptions enumerated in article 163, Code of Practice, relate only to original or rather principal defendants and to jurisdiction in the bringing of ordinary suits against them. The fact that garnishees are not among the exceptions enumerated in that article proves nothing. They come within other provisions of the law, and are treated of in a different section of the Code of Practice, under the head of "attachment in the hands of third persons." In *Williams vs. Kimball*, 8 N. S. 353, the court held that "an attachment, like all other conservatory acts, is not, when the defendant is personally cited, a mode of bringing suit, but a remedy or *incident* which may precede, accompany, or be subsequent to the action. In the language of the Code, "it may accompany a demand or give effect to a suit which the plaintiff has brought or intends to bring."

In *Favrot vs. Delle Piane*, 4 An. 586, the 8 N. S. case is reviewed and

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expressly re-affirmed, and the court says: "Viewed in the light of a conservatory measure incident to the main action, there seems no reason why the jurisdiction of the court for the purposes of attachment where the debtor is personally cited should be confined within its territorial limits."

It has often been adjudged in other classes of cases, and the principle is universally recognized, that courts which have jurisdiction of a cause of the main action have, *ex necessitate*, jurisdiction of all its incidents; so it was held under the old parish-judge system in regard to the power of the parish courts to adjudicate incidentally upon land titles.

It is noticeable that all the provisions of the Code of Practice of Louisiana on the subject of attachment are under the head of "*attachment in the hands of third persons*," the very definition of attachment embraces that language. C. P. 239. The plain and positive provisions of the Code of Practice under that head would seem to settle the question of jurisdiction as to garnishees under attachment beyond dispute, and it would almost seem strange that doubt could ever have existed. Being specific provisions on the subject of attachment, they must of course control more general provisions of the law. By article 246 if a creditor know or suspect that a third person has in his possession property of the defendant, or is indebted to him, "he may make such a person a party to the suit" by having him cited to declare on oath what property of the defendant he has in his possession, or in what sum he is indebted to the defendant, and says "the person thus made a party to the suit is termed the garnishee." Article 250 reads: "A garnishee may be made a party to the suit and be cited to answer interrogatories on facts and articles, either by praying to that effect in the original petition or by a supplemental petition filed at any stage of the suit previous to rendering the judgment." Article 251 provides for citation to the person thus "made party to the suit." Article 252 provides, "if there be a garnishee made party to the suit, the clerk must deliver or send to the sheriff a copy of the petition and of the interrogatories annexed to it, if there be such, with a summons directed to such garnishee to answer the same within the delay given in ordinary suits." What power or duty has the clerk of one court to summon a person before another, or what power or duty has the judge of one court to order or cause the issuance from his court of a summons to answer before another? How is the judge who orders the attachment to render proper or effective judgment, unless the garnishee and his answers are before him? How can he pass upon any contests of claim or privilege which may arise in the cause, either by intention or otherwise, unless the subject of contest is before him? and we have seen that no other court can (Gay vs. Eaton). Article 256 of the Code of Practice speaks of the garnishee as a "party to the suit."

Article 262 requires "the garnishee who has been cited in a suit to put in his answer within the usual delay;" and by article 263 if the garnishee refuse or neglect to answer the interrogatories put to him within the delay of the law, *judgment* shall be rendered against him for the amount claimed, with interest and costs. C. P., article 248, authorizes the creditor, on proper affidavit, to have the garnishee arrested who is about to depart from the State without having filed his answer. The next article, 249, provides for his being discharged from arrest either by giving security or by answering in the presence of the court the interrogatories propounded to him, "and filing such answer in the office of the clerk of the court."

We thus see that the garnishee is directly made a party to the suit, and may be so made either by the original petition or by a supplemental petition; that he is spoken of as "a party to the suit," "*in totidem verbis*," in no less than five articles of the Code of Practice, and so treated of in several others; that he may be cited or summoned to answer by a judge and clerk of a court, who, according to the garnishee in the case at bar, has no jurisdiction over him; that he may be arrested and judgment given condemning him in case of failure or refusal to answer; and yet the court which has all these powers, the court which alone has jurisdiction of the principal defendant, of the main action, has no jurisdiction over one expressly near a party to the suit; a judge may have jurisdiction and sole jurisdiction of a suit, and yet no jurisdiction of a party to it! If no judgment can be rendered by him against the garnishee, how will he cease to be a party? You may make *parties to a suit* for no object or purpose, for, according to the argument, the court in which they are made parties can render no judgment affecting them.

Is not this a *reductio ad absurdum* which demonstrates the unsoundness of the argument against jurisdiction? I was not present, and took no part in the decree in this case, but now express my concurrence in it.

After a careful examination of the arguments and authorities cited in the application for rehearing, and for the reasons given herein and in the opinions of the majority of the court, the rehearing asked for is refused.

No. 6317.

JOSEPH JOUET VS. MRS. E. F. MORTIMER.

The signing by the sheriff (or his deputy) of the notice of demand made on the defendant in executory proceedings, is an irregularity which can only be availed of by the defendant, by pleading it *before* the sale of the mortgaged property. The notice of the sale, in executory proceedings, need only be published three times during the thirty days delay.

29	206
45	305
29	206
47	1283

29	206
d107	778
29	206
112	171

29	206
121	436

29	206
d122	260

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The benefit of the appraisement of his property, may be legally waived by the mortgage debtor.

The validity of a sheriff's deed is not affected by the fact that the accrued taxes on the property conveyed by the deed, had not been paid.

The nullity of a judgment, or of a judicial sale, can only be demanded by one, who has used due diligence to prevent, what he seeks to annul.

The adjudication of the property by the sheriff, and the payment of the price invest the purchaser with the legal title. The deed of the sheriff is merely evidence of the fact.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, A. J.*

Sambola & Ducros, for plaintiff and appellant.

J. L. Tissot, for defendant.

The opinion of the court was delivered by

DEBLANC, J. More than eight years ago, on the eighth of March, 1869, Joseph Jouet, the plaintiff, appeared before a notary public of this city and acknowledged that he was indebted unto Louis Florval Givins in the sum of five thousand dollars, for which he delivered three notes drawn by him to his own order and by him indorsed, two, each for two thousand dollars, the other for one thousand dollars, payable on the eighth of March, 1870.

To secure the payment of these notes, the interest thereon stipulated, and, in case of a suit thereon, the attorney's fees, Jouet gave a mortgage on a lot of ground and the improvements attached to the same. In that act he waived his right to have said property appraised, if seized to satisfy the aforesaid notes and mortgage.

Two of the notes then drawn, indorsed, and delivered by plaintiff passed into the hands of Mrs. Mortimer. She was certainly not a hard creditor, for she proceeded against plaintiff only when there was no hope that he would comply with his obligations.

On the twenty-second day of May, 1874, more than four years after the maturity of the notes—tired, as she was, of promises often made and as often violated—she applied for the seizure and sale of the mortgaged property. The order was granted, the property seized, advertised for sale, and, on the sixth of July, 1874, adjudicated to her for three thousand four hundred dollars.

After that sale, plaintiff asked Mr. Tissot to rent said property for him from Mrs. Mortimer, or Charles Lafitte, her agent; that he would pay twenty-five dollars a month for the portion occupied by him. Mr. Tissot complied with his request, but those parties declined renting to him. He then threatened to go into bankruptcy, and executed his threat.

On the eleventh of September, 1874, more than two months after the property had been adjudicated to Mrs. Mortimer, plaintiff sued out an injunction, in which he prays —

First—That the sheriff of the parish of Orleans and Mrs. Mortimer be

prohibited from molesting or interfering with the possession of the property adjudicated by the former to the latter on the sixth of July, 1874.

Second—That said sheriff be prohibited from making out or completing defendant's title to said property.

Third—That the adjudication of the sixth of July, 1874, from the sheriff to Mrs. Mortimer be avoided and annulled, and she condemned to pay to plaintiff, as damages, the sum of one thousand dollars.

That injunction is based on the grounds —

First—That Mrs. Mortimer had agreed to suspend her execution against him, and to allow him one additional year, or so much time as might suit him, to pay the notes sued upon, on condition that he should satisfy the taxes due on the property and the necessary interest for that purpose.

Second—That defendant violated her promise, deceived him, had the property sold in disregard of their agreement, and should not be permitted to so take advantage of her own wrong and profit by the frightful sacrifice of his residence.

Third—That the notice of demand served upon him is informal, not having been signed by the clerk of the district court.

Fourth—That instead of being advertised once a week, as required by law, the sale of said property was advertised only three times in the official paper.

Fifth—That said property was offered for sale and sold without being appraised.

Sixth—That the State, parish, and municipal taxes due on the lot of ground and improvements so adjudicated have not been paid.

First—Defendant has signally failed to prove any agreement on the part of Mrs. Mortimer to suspend her execution, or extend, as by him alleged, the long-since expired term of his obligations. Placed on the stand as a witness in his own behalf, he said: "I was not present at the sale of my property, and was very much astonished to learn that it had been sold. After I received notice of her judgment, I saw Mrs. Mortimer; she told me that if I could pay the interest and a part of the taxes she would do all in her power to extend the time. I then offered the rent which would be due at the end of the month by two of my tenants; that was forty dollars. Mrs. Mortimer gave me no answer, but she was pleased with the arrangement, and invited me to go and see Mr. Tissot, her attorney. I did. He told me to settle my taxes, and he would give me as much time as I required to pay the interest. I was satisfied that the matter was entirely settled. I looked in the paper to find out whether my property was advertised for sale. It was not. There remained due of the interest, which was payable in advance, two hundred dollars; for

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that I offered Mrs. Mortimer the monthly rent of forty dollars. I did not waive, as I know, my right to have the property appraised. The property, when sold, was worth eight thousand dollars, and mortgaged for six thousand dollars."

Cross-examined, he said: "The conversation between me and Mrs. Mortimer took place a few days after or the day after I saw in the paper the advertisement that my property was to be sold, and again a few days later. This was between the first and tenth of May. I was in the way to collect money to pay the taxes, and I could, but did not, pay them."

Mrs. Mortimer testified in substance as follows: "Plaintiff came to my house to ask me to stop the sale and grant him time to pay my notes. I told him I had waited long enough and could not wait any longer. I think it was in June that Mr. Jouet called; his property was then under seizure. I told him I would listen to him after he had paid all the back taxes, back interest, and one of the notes. Mr. Buisson was then present."

Mr. E. Buisson fully corroborates Mrs. Mortimer's declaration. In addition to it, he said: "When Jouet offered a certain amount on the interest due, that lady exclaimed: 'Why, the first time you offered me more than that.' He replied, 'I did; I had it then; I have it not to-day.'"

Plaintiff's own declaration does not establish that Mrs. Mortimer agreed to suspend her execution and postpone the payment of the note she held, but it does establish that if, as pretended, she made a proposition to plaintiff, or he to her, he has not complied with any of the conditions fixed or accepted by them. He has paid neither the interest nor the taxes.

Second—The charge that Mrs. Mortimer has broken her agreement, deceived plaintiff, and that she should not be permitted to take advantage of her own wrong, and profit by the frightful sacrifice of his property, is as unfounded as the first. She was guilty of no wrong, resorted to no deceit, pursued the course indicated by law, purchased at public auction property on which she had a mortgage, and for that property paid a price equal to its value. That is sworn to by Messrs. Charles Lafitte and E. W. Murphy, two disinterested witnesses.

Third—The third ground urged by plaintiff to annul the sale to Mrs. Mortimer is that it was a deputy sheriff who signed the notice of demand served upon him. This, as we have already decided, constitutes an irregularity. That notice should have been given by the clerk of the court or one of his deputies. But is it one of those irregularities which can be complained of more than two months after the sale? Could plaintiff fold his arms, wait until the purchaser had paid taxes amounting to

hundreds of dollars, and then, without tendering back any fraction of these taxes, assail the purchaser's title? In our opinion he could not.

Fourth—As to the advertisement of the sale, what fact is disclosed by the evidence? De Armas, deputy sheriff, said: "The notice of the sale was published three times in the official paper, from the second of June to the sixth of July. This for thirty-five years has been the custom in the office of the sheriff of the parish of Orleans."

What does the law provide? "The sale of immovables shall be made thirty days after the first notice given of the same." C. P. 670. In this case the notice was published during the prescribed delay. Plaintiff read the first advertisement. He knew that an execution had been issued; that under it his property had been seized; notice of said seizure was served on him; he knew that said execution had not been returned; and though he may have imagined that these proceedings had been suspended, he had no reason, not even a pretense, to so imagine, and had every reason to believe exactly the reverse.

The articles of the Civil Code relied upon by plaintiff's counsel have reference to the notice to be given of an application for the curatorship of a vacant estate, and of sales of property belonging to successions.

Fifth—On the trial plaintiff was asked: "Have you ever waived your right to have the property appraised?" He answered "No, not as I know." This answer contradicts the declaration made by him in the act of mortgage, and which we here transcribe: "The said mortgager expressly dispenses with all and every appraisement of the property, waives and renounces the benefit of appraisement, and of all laws or parts of laws relative to the appraisement of movable or immovable effects seized and sold under executory or other legal process."

In the nineteenth Annual, page eighty-nine, the court said: "The only question presented in this appeal is whether the clause in the act of mortgage, dispensing with the appraisement of the property, is valid in law. The same point was presented in the case of Broadwell vs. Rodriguez, and, after full discussion by counsel, and mature deliberation by the court, it was held that such a claim is legal and valid, and we find no reason to change our opinion." 19 An. p. 89; 18 An. p. 68.

Sixth—The law provides that "the sheriff of the parish of Orleans shall not pass or execute any act for the sale of any real estate unless the taxes due on the same be first paid. If he does, he shall be fined." This provision only enlarges the legislation which existed on the same subject, and which required every notary, before passing an act of sale, mortgage, or donation, to obtain from the recorder of mortgages a certificate showing the rights existing against the property, and to mention those rights in his act.

The law, however, does not pronounce the nullity of any contract evi-

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denced by an act passed in derogation of those enactments, and, more particularly, of an adjudication of property sold under execution, for the sheriff can not tell the purchaser, "You are the last bidder; come forward and pay the taxes, or else I shall withhold the adjudication." He is bound to first adjudicate, and may suspend the completion, not of the title, but of the evidence of the title. Is this any concern of plaintiff's? Not only he does not pay his creditor, not only he compels that creditor to pay the taxes for which he is liable, but he assumes the right to oppose the execution of a deed from the sheriff to defendant until she satisfies a claim due by him to the State. Had the sheriff been disposed to disregard the law, the collector and not the delinquent taxpayer could have properly interfered.

We adhere to the doctrine that in forced alienations of property the law must be strictly complied with to give validity to those alienations; but many of the irregularities which may be relied upon to retard a sale can not be successfully urged to annul it; otherwise, as said by Mr. Justice Martin, in the case of Grant & Olden against Walden, "the flood-gates of litigation would be uplifted, cupidity would be invited to repeated attacks, and the people would feel alarmed and insecure at the precariousness of judicial sales." The law has nearly lost its authority; the current of justice is nearly checked; and, howsoever disposed we are to respect and cause to be respected the forms prescribed by law, we consider it as the first duty of a court to discourage the reckless, the illegitimate litigation which—in our State—has rendered so difficult, so onerous, the exercise of the most indisputable rights.

In the cases cited by appellant's counsel we have found in one that the notice of demand was served on defendant's counsel, after the seizure, that the notes declared upon were prescribed; in the others that the judgment under which the sale was made had not been introduced in evidence, that there had been no appraisement made of the property, that the sale had not been advertised during thirty days, or that a sale had taken place when no seizure had been executed. It is evident that under such loose and defective proceedings no title was or could have been divested.

In the assailed proceedings there was but one informality; instead of being signed by the clerk, the notice of demand was signed and served by a deputy sheriff. Though informal, that previous demand was made. The debtor might have then and on that ground enjoined the execution. He did not do it, allowed the sale to be advertised, the property to be sold, after it was sold offered to rent it from the purchaser, and, sixty-four days after, filed an action to annul it. His only object was to obtain delay; he must be satisfied.

In opposition to plaintiff's authorities, as a bar to his pretensions, there

is a long list of decisions which command that no judicial sales shall be disturbed, unless by one who has the right to rescind or annul them, by one who can show injury to himself or an advantage to be gained by the cancellation of the sale.

The original plaintiff is now an adjudged bankrupt, represented by an assignee. The latter appeared in the State court, averred that it had lost its jurisdiction, and prayed for a transfer of this case to the Federal court. His application was denied; he excepted; but as he has not urged we presume he has abandoned his exception. From the judgment dissolving the injunction he has appealed.

In this case the order of seizure and sale was not, could not, be reached by plaintiff's injunction. Were we to annul the sale, that order would stand unaffected by our decree, and we would have but assisted plaintiff in harassing his creditor. Of ten debtors who take the benefit of the bankrupt act, five at least drag their creditors in the Federal court, to gratify their spite, to harass the creditor.

In regard to those who seek the nullity of judgments, what is the rule? It must appear that they have conformed to those essential requirements which equity exacts from litigants who invoke its aid. They must have used all reasonable diligence, and not neglected to use such means as they possessed to prevent the evil of which they complain. Are judicial sales exempted from the operation of that rule? They are not. 18 An. 497.

Immediately after the sale from the sheriff to Mrs. Mortimer, plaintiff applied to her to rent the portion of the premises which he then occupied, and which we presume he continues to occupy. Does not that application constitute a ratification? Is it less than a recognition of her title? It may be said that this is not sufficient to validate an invalid title; that as to immovables the evidence of the ratification should be reduced to writing.

In the eighth volume of his Commentaries, under No. 491, Toulier mentions two sorts of ratifications, the second of which is: "Celle par laquelle nous approuvons un contrat ou autre acte auquel nous avons concouru, ou auquel nous avons été appelés, mais qui était susceptible d'être attaqué pour des vices réels ou apparents, de nature à en faire prononcer la nullité ou rescision." This last sort of ratification is that provided for in our Code, and in one, as well as the others, "peut être faite expressément ou tacitement, verbalement, par écrit, ou par des actes qui manifestent clairement notre volonté, parfois même par le silence."

Several instances of express and tacit ratification are found in our jurisprudence, in which this court, in accordance with the principles recognized by Toulier, has uniformly decided that an act may be approved by implied or tacit ratification, though null and void *ab initio*. 10 M. 526; 7 L. R. 17; 4 R. R. 134.

Out of the price of the property adjudicated to her, or out of her funds, and because of that adjudication, Mrs. Mortimer has paid a considerable amount of taxes due by plaintiff. Besides, in spite of the sale from the sheriff to her, and since that sale, plaintiff has had possession of the property in dispute. Can we, in presence of these facts, annul the defendant's title and legitimate plaintiff's possession?

On several occasions this court said, in substance: "Nothing could be more unjust than to permit a debtor to recover back his property, because the sale is irregular, and yet allow him to profit by that irregular sale, to discharge his debt. 11 M. R. 615; 3 N. S. 466; 4 L. 198; 19 L. 283; 2 R. R. 180; 5 R. R. 65; 6 R. R. 450; 21 An. 425.

In 5 An. 584 this court said: "We are of the opinion that the judgment, execution, and sheriff's return showing the adjudication are sufficient to prove the sale, without the deed. The adjudication and payment of the price are now, by express provisions of the Code of Practice, sufficient to transfer the property. The sheriff's deed is an additional muniment of title to the purchaser, but the defendant's rights were entirely divested by the judgment, the execution, and adjudication.

When we consider that, at the date of the sheriff's sale, the acknowledged mortgage and the taxes affecting said property amounted, including interest, to about eight thousand dollars; when we consider that said property is worth but thirty-four hundred dollars, the price which Mrs. Mortimer paid for it; that since the sale plaintiff, though enjoying possession of the property, has allowed it to be offered for sale for taxes, and that defendant's agent has again been compelled to pay that tax; that even if we were to annul the sheriff's sale no possible advantage could thereby accrue to plaintiff or his creditors; and that, under all circumstances, the property itself or its price would inevitably return to Mrs. Mortimer and the holder of the other note of the eighth of March, 1869, we can but conclude that it would be as gross as frivolous an injustice to prolong a litigation as fruitless to the debtor as expensive to the creditor.

There is no reason to disturb the judgment of the lower court.

It is therefore ordered, adjudged, and decreed that said judgment be and it is hereby affirmed at the costs of plaintiff.

No. 6548.

MARY D. COOPER ET AL. VS. SAMUEL C. CAPPEL ET AL.

Co-trespassers are liable *in solido*.

The husband may and should sue in his own name, to enforce any right of his wife, except when the wife exclusively administers her own property, or when the ownership of some dotal or paraphernal effect, or real right of hers is involved. A joinder of the wife will be treated as mere surplusage.

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Mary D. Cooper vs. Cappel.

In a suit for damages on account of a trespass the trouble and expense the plaintiff has been illegally put to are to be considered in estimating the damages. Attorney's fees are a part of such expense, and may be proved, even when they have not been specifically alleged.

The attempt of a lessee, or his vendee, to forcibly remove from the leased premises, property subject to the lessor's privilege, is a trespass, sounding in damages.

An irregularity in the method of returning a verdict by a jury, which does not injure any of the parties, will not vitiate the verdict.

A PPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J.* Trial by jury.

R. J. Bowman, for plaintiffs.

Robert P. Hunter, for defendants.

The opinion of the court was delivered by

MARR, J. This is an action by husband and wife to recover damages for alleged wrongs to person and to property.

The petition charges substantially, that on the sixteenth of February, 1876, the defendants came to the gin on the premises of petitioners and forcibly and violently took and carried away seven bales of cotton, belonging to the wife and in her possession at the time. That this cotton was raised on the plantation of the wife by one of the defendants, Joseph D. Bass, who was indebted to her in the sum of six hundred and twenty dollars for rent, and left with her this cotton, on which she had the lessor's lien and privilege.

That defendants came to the gin with two wagons, and one of the number threatened to kill Silas H. Cooper, the husband, who resisted the taking of the cotton by them; that one of them shot at and assaulted him, and two others of them held him while the others took possession by force and violence, placed the cotton on the wagons, and carried away and converted it to their own use.

That the cotton was worth fifty dollars a bale; and that petitioners, by the violent invasion of the premises, and the disturbance of their peace and security, as well as by the assaulting of the husband and the lawless deprivation of their property, have been damaged in the sum of six thousand dollars, for which they pray judgment against defendants *in solido*.

Defendants excepted on the grounds—that the petition discloses no cause of action; that it is too vague and indefinite; that there is a misjoinder of parties; and that defendants can be brought into court only by separate suits against each individually.

These exceptions are simply frivolous. The petitioner charges with sufficient distinctness and clearness such wrongs, both to person and property, as form the basis of civil actions for reparation in damages, and of public prosecutions for the insult and injury to the peace and dignity of the State under all civilized governments.

The word "jointly" was used improperly in the English text of article-

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2304 of the Civil Code by mistranslation of the corresponding word, "*solidairement*," in the French text. This article was amended by the act of 1844, page fourteen, so as to make the English text agree with the French text, and since the passage of that act there has been no room for question that co-trespassers are liable *in solido*. Article 2324 of the Revised Code, which takes the place of article 2304 of former editions, uses the words "*in solido*" instead of "jointly," in accordance with the act of 1844.

These exceptions were properly overruled, and defendants immediately filed others, which should have been disposed of in the same way:

First—That there is a misjoinder of plaintiffs; that the wife sues for the value of seven bales of cotton, and vindictive damages, while the husband sues exclusively for vindictive damages for the attack upon his person and the injury to his feelings.

Second—That an action for vindictive damages must be based upon or grow out of actual damages.

Third—That the district court was without jurisdiction, because the action is based upon the wrongful taking of seven bales of cotton, alleged to be of value less than five hundred dollars.

First—It may be true that the plantation leased to Bass belonged to the wife as alleged, but it is not alleged that the wife was separate in property, nor that she administered her paraphernal property separately and alone. We can not assume that to be true which is not necessarily so, and which is neither alleged nor proven. Most wives rely upon their husbands to manage their affairs, and this is so consonant with the trust and confidence which should ever exist between husband and wife that we would presume it to be true in every case in the absence of allegation and proof to the contrary. C. C., article 2385 (2262).

The fruits of paraphernal property administered by the husband or by husband and wife indifferently belong to the conjugal partnership if there be a community of gains. C. C., article 2386 (2363). And rents are civil fruits. C. C., article 545 (537).

Community is a consequence of marriage where there is no stipulation to the contrary. C. C., article 2399 (2369). And this community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact. C. C., article 2102 (2371).

Husbands may proceed in their own names to enforce the possessory and personal rights of their wives. It is only where the wife administers her paraphernal property separately and alone, or where the ownership of the dotal or paraphernal property or some real right belonging to her is involved that suit must be brought in her name, with assistance of her husband or the authorization of the judge. C. P., article 107.

Actions for personal wrongs to the wife or for injury to her paraphernal

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property not administered separately and alone by her should be brought in the name of the husband alone, because the damages recovered would fall into the community, of which he is head and master and sole administrator. C. C. 2404 (2373). But as this court said, in Barton vs. Cavanaugh, which was a suit by husband and wife for the malicious arrest of the wife, "the joinder of the wife does not destroy the action, and it may be regarded as surplusage." 12 An. 333.

If it had been alleged in this case that plaintiffs were not in community, or that the wife administered her paraphernal property separately and alone, and that trespassers entered upon her premises and assaulted and beat or otherwise maltreated the husband while he was endeavoring to protect her rights and her property, we see no good reason why they might not unite in a single action against the wrong-doers and recover the aggregate of the damages proven by them respectively. The lawless invasion of the rights and property of the wife would be aggravated by the violence done to the husband while endeavoring to protect and defend them, as his duty required; and the assaulting and maltreatment of the husband would be aggravated by the injury done simultaneously to the rights and property of the wife.

We have no doubt the allegations of the petition would authorize an action by the husband in his name alone; but the joinder of the wife, where she is not a necessary party, may be treated as surplusage, and it can not in any respect prejudice the right of recovery.

Second—If by *actual damages* pecuniary loss is meant, and the intention is to assert that an action can not be maintained for violence done to a man while endeavoring to protect property lawfully and peaceably in his possession, because it does not belong to him, and he does not allege loss to himself of money or of property, the proposition is not true in law, and the tendency and consequences of such a doctrine would be most mischievous.

Third—It is certainly a new idea, and one which we can not sanction, that, in an action for assaulting and shooting at a man, and for taking forcibly and violently and carrying away property which was lawfully in his possession, whether in his own right or in right of another, the measure of damages is the value of the property.

These exceptions were referred to the merits. They have no foundation in law, and they should have been overruled absolutely.

Three of the defendants, Matthews, Amos, and Pierre, pleaded a general denial, the two others, Cappel and Bass, answered separately. Cappel, after the general issue, avers that he bought the cotton from Bass in good faith for a valuable consideration. That Bass represented to him that he had paid the rent. That Bass had leased the premises and the gin-house from Mrs. Cooper, and was holding over, in his posses-

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sion as lessee, until he could gin and remove the crop made by him; and that he entered the premises after the purchase of the cotton, *bona fide*, and in company with Bass, for the sole purpose of accepting the delivery of the cotton from Bass, at his request, and in pursuance of the sale. He denies that the cotton was ever delivered to or in the actual possession of Mrs. Cooper or of her husband and agent, Silas H. Cooper. He denies that she ever had *jus in re*, and alleges that her claim on the cotton was only *jus ad rem*, which was imperfect, and gave her a right of action only.

He denies that he ever disturbed the peace or security of Mrs. Cooper; he denies that the loss of seven bales of cotton can be made the basis of an action for damages for six thousand dollars, so as to give the court jurisdiction, and he expressly reserves his peremptory exception to the jurisdiction.

Bass pleads the general issue; and he specially avers that he leased the premises for the year 1875 from plaintiffs, and was, at the time set forth, holding over in his possession of the land and the gin-house; that he never delivered the seven bales of cotton to either of the plaintiffs in payment of rent or other claim; that he sold the seven bales to Cappel for a price agreed upon, and that he went with Cappel and wagoners for the purpose of delivering the same to Cappel upon the premises, of which he was still in possession; and that he did then and there deliver the same to Cappel.

The case was submitted to a jury on these pleadings; and a verdict rendered against defendants, *in solido*, for one thousand dollars in damages. From the judgment rendered on this verdict both parties appealed; and the plaintiffs have answered the appeal taken by defendants, and pray that the judgment be so amended as to allow them six thousand dollars.

Five bills of exception were taken by defendants, which we shall dispose of before entering upon the merits:

First—Defendants objected to the admission of testimony to prove injury to the feelings of plaintiffs, and attorney's fees as part of the damages, on the ground that the only specific sum claimed as damages was the value of the seven bales of cotton; that defendants having excepted to the jurisdiction plaintiffs could not prove any amount of damages to give the court jurisdiction. They also objected that plaintiffs had not claimed attorney's fees, and they could not be permitted to prove more than they claimed.

The court admitted the testimony on the ground that the cause of action is an offense against the person and property of plaintiffs; and the fees of attorneys, the value of the property, and the injury to the feelings of the plaintiffs might all be the subject of inquiry in the assessment of damages.

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In a case like this there is no basis upon which the damages can be fixed with absolute certainty; and the jury may well consider the trouble and expense to which the plaintiffs have been subjected by the wrongful act of defendants; and it is proper for them to take into the account, as part of the expense, the reasonable fees of attorneys. See *Dyke vs. Walker*, 5 An. 521, 522. The suit is for damages, and not for attorney's fees; and it was not necessary to claim the attorney's fees specifically in order to let in the proof as an element of damages.

The objection on the ground of want of jurisdiction is altogether unfounded. Where the jurisdiction depends on the amount in controversy the sum demanded determines the question; and the amount sued for in this case is six thousand dollars.

Second—Under an agreement, counsel for plaintiffs introduced the testimony of two witnesses, who were not present, taken in writing on the preliminary trial of the case of the State vs. Cappel and others; to which defendants objected on the ground that it was *res inter alios*; and that the agreement only related to such witnesses as were present and subject to cross-examination.

The court correctly ruled that the admission of the testimony was in accordance with the agreement between the parties, as entered on the minutes.

Third—Counsel for defendants read to the jury and commented on the case of *Black vs. Carrollton Railroad Company*, 10 An. 33, and asked the court to charge the jury in the language used by Chief Justice Slidell in that case, p. 44. The bill of exceptions states that the court refused to give the charge. The judge says he did not so refuse. That he told the jury all the law read by defendant's counsel was good law, but that the case was different from that at bar, and the decision read was not applicable. He told the jury, however, that they were the judges of the law and the facts.

It is most remarkable that the judge did not tell the jury that the language which the counsel for defendants desired him to tell them was the law, and applicable to the case, was that used by one member of the court in his dissenting opinion; that it was not the language of the court; that the majority of the court decided that it was not law in that case, and that it had no application whatever to the case they were trying.

Fourth—The court charged the jury that the lessor may take the effects upon the leased premises, and keep them until he is paid; that his lien is as valuable to him as if he were the owner of the property itself; and not even a sheriff or marshal can take away the property before paying the lessor his rent.

This charge is almost in the very words of the Civil Code, article 3185,

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and of this court in Robb vs. Wagner, 5 An. 112, and Arick vs. Walsh, 23 An. 605, 603. As there was no seizure by sheriff or marshal, the judge had no special occasion to refer to them, but what he says might well be stated to the jury, *arguendo*, to show the wrong done by the defendants in depriving the plaintiffs of property by force which even the sheriff or the marshal could not take away under legal process without paying the rent.

Fifth—The case was submitted to the jury Saturday evening about five o'clock, and the court adjourned until Monday morning. On Sunday morning at ten they notified the judge, through the sheriff, that they had agreed upon a verdict, and they came into the court-room, accompanied by the sheriff, and handed their verdict to the judge, which was read aloud to them, and which they, each and every one, stated was their verdict. The judge told them they might be discharged from the confinement of the jury-room, but that they must return Monday morning and render their verdict, which they did in open court, and which they again declared was their verdict.

All these proceedings were in the presence of the counsel for defendants, and the verdict which was handed to the judge and which was read on Sunday is the same which was rendered on Monday in open court.

When the court adjourned Saturday evening the judge might have told the jury, in case they agreed, to return a sealed verdict. It seems he did not do this. Where the jury return a sealed verdict it is handed to the clerk, but it is not easy to perceive any good reason why, in a civil case, if the judge should be willing to repair to the court-room, the jury might not, in presence of the parties or their counsel, hand to the judge their verdict in writing, on Sunday, and be discharged from the confinement of the jury-room. The publicity given to the verdict, the signature by the foreman, the reading it aloud, and having the declaration of each and every juror that that was the verdict, afforded ample security against any subsequent alteration, and this seems to us equally as safe as the delivery of a sealed verdict to the clerk. If the proceeding in the case was irregular, it certainly was nothing worse, and it in no manner prejudices either party to the cause, nor can it vitiate the verdict.

Joseph D. Bass leased the plantation of Mrs. Cooper for one year, ending January, 1876, for \$700. He remained on the place for the purpose of gathering the crop, good part of which he shipped to market. On the twenty-fifth of January he and Cooper made a settlement, and Bass made out, in his own writing, and signed a statement showing balance due by him for the rent, \$620 40, "for which my entire crop is bound until satisfied."

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Bass left the place on that day, twenty-fifth of January, 1876, and Cooper permitted him to take away his personal effects, including two mules and a horse, leaving, to pay the rent, the cotton that was in the field, which Cooper had picked by hands hired and paid by him.

On the sixteenth February, when this cotton was passing through the gin and being put into bales, Bass returned and superintended the work. About five o'clock in the evening he left and went to the store of Cappel, about one mile from the gin, and there, in the presence of persons who seemed to have been called to witness the transaction, he sold to Cappel the seven bales, the entire remainder of his crop, at eight cents a pound, city weights, which means simply that Cappel was to ship the cotton to New Orleans and to allow Bass for so many pounds as the cotton might be found to weigh at New Orleans.

There was no money paid, and none was to be paid. Bass owed Cappel, and was to be credited with the amount in account.

Immediately on the closing of this transaction, Cappel, his clerk, Matthews, Ralph Amos, and Zeddo Pierre got on the two wagons which belonged to Curry, the uncle of Cappel, and which had arrived from Evergreen at an early hour in the day, and set out for the gin on the Cooper place, accompanied by Gillmore Curry and Bass on horseback, to receive delivery of the cotton, and to remove it from the premises. On the way, between Cappel's store and the gin, they passed the shop of Odom, about sunset. Matthews and Cappel called to Odom to get his pistol and go with them, which Odom, did and his brother accompanied them.

After the Odoms got on the wagon, Cappel told one of them, who testified on the trial, that they were going to have some fun. They were going to Cooper's to get some cotton. That Joe Bass was to do the fighting, as he had his pistol and his brass knuckles on; that Cooper had some eight or nine armed negroes at the gin and "says we shan't have that cotton." He then drew his pistol, and said with an oath, "If I get among them I'll make them scatter," and he handed his pistol to Odom to look at, which he did, pronounced it all right, and returned it to Cappel.

About this time, and as they were approaching the gin-house, Odom jumped off the wagon and Gillmore fell behind. Cappel and Bass headed the party and led the wagons into the gin-lot or inclosure in which the gin-house stood, and turned them round near the gin-house.

Cooper inquired of Cappel what his business was. Cappel said he had come for two bales of cotton belonging to one Griffin, also a tenant of Mrs. Cooper, and he offered to pay the rent due by Griffin. Cooper asked Cappel why he had brought two five-mule teams to take away two bales of cotton, and Cappel then informed him that he intended to have all the cotton there. Cooper said he could not do that, that the

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cotton belonged to his wife; if he took it he must take it by force, and that he would be robbing an innocent woman. Cappel, addressing Bass, said: "Joe, Mr. Cooper says this is his cotton." Bass answered, "It is no such thing, for I made the cotton, and I turn it over to you." Cappel then said, "If that's the way it is, put it in the wagon, boys."

About this time Cooper and Cappel were near together, and there is some proof that Cooper took Cappel by the shoulders and shook him. Cooper drew, or had in his hand, a small derringer. Cappel drew his revolver, aimed it directly at Cooper, and threatened to kill Cooper if he did not put up his derringer. Curry, who up to this time had remained on his horse, jumped off and struck down Cappel's arm, so that his pistol was lowered and the ball missed Cooper. Cappel struck at Cooper with his pistol, and either the blow knocked him down, or he stumbled and fell. Curry, the uncle, and Matthews, the clerk of Cappel, immediately laid hands on Cooper, and took him off and held and detained him in spite of his resistance and struggles, while the cotton was put upon the wagons, and until Cappel left, followed by the loaded wagons.

Curry and Matthews say they held Cooper to prevent his shooting Cappel or Cappel shooting him, but no one held Cappel. Cooper insisted on their releasing him, and Curry said he would if Cooper would give up his pistol. Cooper said he wanted to go where Cappel was. Curry said he might if he would surrender his pistol. About this time Odom came up and interposed, and told Curry he ought to let Cooper have his pistol, to which Curry answered, "If you have any business to attend to you had better do it."

Cappel corroborates Odom fully with respect to the preparation he had made for a fight. He says:

"When we were on the wagons I heard that there were some seven or eight negroes at the gin-house, and I showed my pistol to Mr. Odom, and said if I got after them with it I would make them scatter if they interfered with me."

He says, on cross-examination: "The cause of the row was because Mr. Cooper would not let me take the cotton, and pulled a pistol on me. The cause of the row was because Mr. Cooper resisted me in my attempt to take the cotton, which he said belonged to his wife, and because he pulled a pistol on me."

It is sufficiently proven that Cappel knew from Cooper's statements to him, on the Saturday before the sixteenth of February, that Bass had not paid the rent, for Cooper told Cappel he would give one hundred dollars to any one who would take the cotton and pay the rent due by Bass.

The pretense that Bass was holding over and was in possession under the lease, and that he could give authority to enter the inclosure and

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take away the cotton, is idle. Bass should have gathered the cotton and have ginned it, so as to have made it available to Cooper for the rent, and his presence at the gin-house on the sixteenth, for the purpose of baling the cotton, was not unlawful, because it was with Cooper's consent. But in no sense was he a lessee holding over on the sixteenth of February, after having left the premises, moved off, on the twenty-fifth of January. The entire party, all the defendants, were simply trespassers and violators of the rights of possession and of property when they left the road with their wagons and drove into the gin-house inclosure.

Cappel paid no money for this cotton. He and Bass and Matthews testify that Bass owed him more than the value of the cotton, as they say, for advances and supplies to make the crop, and Bass wanted Cappel to have the cotton, because Cappel promised to advance to enable him to make another crop. Cappel had not recorded any privilege for the debt due by Bass; and the property, the cotton, was on the leased premises, in possession of the lessor. There is no room to question the right of the lessor to keep and retain this property until the rent was paid; and this right was superior to any right which Cappel had or could have acquired.

Cappel knew that Cooper would not give up the cotton willingly. He knew that before he left the store. It was not necessary to go with eight others, armed, to receive delivery of seven bales of cotton from the owner. But Cappel told Odom that Cooper "says we shan't have this cotton;" and there was apparent necessity for him to go in force when he knew that Cooper either had or professed to have superior rights and claims to it, and had also the courage and manhood to assert his rights, and to attempt to maintain them.

What Cooper did after Cappel had, with his co-trespassers, entered the premises and Cappel had ordered the boys to put the cotton on the wagons, notwithstanding the remonstrances of Cooper, and his repeated declarations that Cappel would have to take it by force, and that he would be robbing an innocent woman, it is not material to inquire. Far be it from us to encourage or sanction by any word of ours violence or a resort to force to vindicate rights which may be enforced through the machinery of the law, but we deem it not improper to say under all the circumstances of this case, if Cooper had killed Cappel he would have incurred no criminal responsibility; while if Curry had not at the critical moment struck down Cappel's arm he would in all probability have been guilty of one of the highest crimes known to the law—murder—while engaged in a lawless violation of the right of property.

There was, beyond doubt or question, a lawless combination, a conspiracy, a pre-arrangement by the defendants, to go to the gin-house at a late hour—it was after sunset when they left the store, getting dusk when

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they reached the gin-house—to take and carry away the cotton by force, by the use of deadly weapons, firearms, provided in advance, if Cooper could not be overawed and the anticipated resistance repressed by numbers and by bluster.

Such lawlessness must be repressed, must be put down by the strong hand of the law, and wrong-doers must be taught that “the way of the transgressor is hard.” It is only when the laws are enforced and obeyed, when rights are observed and respected, and when the citizen can feel that he is secure in his person and property so long as he does no wrong to others, that there can be peace, good order, and prosperity in the land.

We have searched the record in vain for one single mitigating circumstance. An old grey-headed man, as Odom describes him in his testimony, a “functionary of the Methodist Church,” as Cappel calls him in his answer, an itinerant preacher of the gospel, while peaceably engaged at work on the premises of his wife, is assaulted, shot at, held forcibly by two men while others of the same party take and carry away property which he claims in behalf of his wife, and which two of the chief trespassers knew was subject to her right of pledge as lessor. Comment would but weaken the force of the simple statement of the facts.

We consider the case one which eminently requires exemplary damages, and it affords a fit occasion to give warning to the lawless and the violent that they are not to expect leniency at the hands of the judicial tribunals. If the jury had given the full amount of damages sued for, we should not have disturbed the verdict; but the amount awarded is wholly inadequate. We gather from the record that the grand jury of Rapides parish have dealt with this matter, and that fact may have influenced the jury in their assessment. It shall have all the effect with us to which we think it entitled.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended, and that plaintiffs recover of defendants, *in solido*, the sum of three thousand dollars with costs in both courts.

No. 6538.

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STATE EX REL. ARMAND MERCIER VS. THE JUDGE OF THE SUPERIOR DISTRICT COURT ET AL.

In computing the time within which a suspensive appeal may be taken, neither non-judicial days nor the day the judgment was signed, nor the day the appeal was taken, are to be counted.

A law is not obligatory, until promulgated. Thus a court created by statute continues to exist, until the act repealing that statute has been promulgated.

The mere publication of a legislative act in the official journal, is not necessarily a

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promulgation of the act. Promulgation of an act must be made by the officers, and in the special mode, prescribed by law.

S. P. Blanc and A. B. Phillips, for relator.

George H. Braughn, for Fischel.

The opinion of the court was delivered by

MANNING, C. J. The relator applied for writs of mandamus and prohibition, the former to be directed to the judge of the Superior District Court, commanding him to grant a suspensive appeal from a judgment rendered by him against relator in favor of Lewis Fischel, and the latter to be directed to the plaintiff, Fischel, prohibiting him from proceeding to enforce his judgment until that appeal can be heard. The writs were provisionally issued, and, oral argument having been allowed and heard, the application of the relator now comes up for adjudication.

No answer is filed by the judge, and the other defendant makes several objections to the confirmation of our previous order, of which as many shall be noticed as are necessary for the decision of the question before us.

One of them is that the petition or motion for an appeal comes too late. The judgment was rendered on the fourth of January of the present year. The appeal was prayed on the seventeenth of the same month. There were two Sundays in that interval. In computing the time in which a suspensive appeal may be taken, neither the day on which the judgment was signed nor that on which the appeal was taken are included. The appeal was therefore in time. *Garland vs. Holmes*, 12 Rob. 421; C. P., article 318.

Another, and the chief cause, shown by the defendant why the writs should not be made peremptory, is the alleged abolition of the Superior District Court.

The journals of the two houses of the General Assembly for the session of 1867 have been offered in evidence. From them it appears that a bill was passed abolishing that court, but did not become a law. It is said in argument that it was never signed by the Governor, or by any one assuming to exercise the functions of Governor. Certainly it was never promulgated, and a law must be promulgated before it becomes obligatory. Civil Code, article 4; *Cheyron vs. Attorney General*, 12 La. 315. The Superior District Court must still have a recognized legal existence, unless the law creating it is shown to have been abrogated in some other way.

This is said to have been accomplished by an act, having the semblance of legislative forms, and purporting to have been passed by an assemblage of persons sitting in the St. Louis Hotel of this city. A printed slip, purporting to be a copy of this act, is in evidence, from which it appears to have been passed on the fourth day of January,

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1877. This assemblage assumed, in passing that act, to be the General Assembly of Louisiana.

It is a part of the public history of the time that there are two persons, each claiming to be the Governor of this State at this time, and there are two bodies, each claiming to be the legal Legislature of the State. A legal dual government of a State is impossible. There can not be two Governors of the same State at the same time, each having the legal right to exercise authority, nor two Legislatures, each with legal right to enact laws. This court recognizes Francis T. Nicholls as the sole and lawful Governor of this State, and the two bodies whose sessions are held now at Odd Fellows' Hall in this city as the only legal Legislature of this State. The acceptance of a judicial office is a recognition of the authority of the government from which it is derived. Our own commissions are derived from the government of which Governor Nicholls is the executive. If we decide at all as a court, we necessarily affirm the existence and authority of the government under which we are exercising judicial power. This is stated as a necessary consequence flowing directly from the origin of a court's authority in the opinion in *Luther vs. Borden*, 7 How. 40, wherein it was definitively settled that the power of deciding between the claims of two rival governments in a State vests in the political department of the national government. It is, however, apparent that questions involving necessarily a decision of the legality of a State government may and do come before a State court, and in which the judgment of the court is as authoritative as if rendered upon the question directly. For instance, a State court does incidentally decide who is the lawful Governor of a State by commanding a subordinate officer of the State to release from prison a convict who had received a pardon from that Governor. In like manner we decide the illegality of a Legislature when we declare the invalidity of an act enacted by persons styling themselves the General Assembly of this State, in and by which the Superior District Court for the parish of Orleans was abolished and a new tribunal was erected, styled the Superior Civil Court.

The act is void. The pretended legislation is without authority. The persons composing the two bodies which thus assumed to legislate are not the General Assembly of this State, and are not therefore clothed with legal power to enact laws for the government of the people or for the guidance and obedience of the courts. The act creating the Superior District Court is hence in full force, not having been repealed.

We shall therefore perpetuate the prohibition forbidding the defendants from proceeding to enforce the judgment of the Superior District Court against the relator until his appeal can be heard, and we make peremptory the mandamus to the judge of that court commanding him

to grant a suspensive appeal to the relator, the process upon the judge to be served so soon as one shall be inducted into that office by the proper authority.

Let judgment be entered accordingly.

Since this opinion was prepared, publication of an act, purporting to repeal the act creating the Superior District Court, was made in the official journal on last Thursday, of which we take judicial cognizance. Appended to it is a certificate of the Chief Clerk of the House of Representatives, without date, that it "is a true copy of House bill No. 287, which passed both Houses of the General Assembly, in the session of 1876," which bill was signed by the presiding officers of the two houses and was sent to the Governor on the eleventh of March, 1876, and that "this act was never promulgated nor returned to the house in which it originated," with either approval or objections. It is apparent that this publication was supposed to operate a promulgation of that bill.

The promulgation of laws is an executive function. Elle consiste, en réalité, dans l'opposition faite par le chef de l'état, de la formule qui ordonne l'exécution de la loi. 1 *Marcadé*, No. 28. It is the extrinsic act which gives a law executory force. The mode of promulgation may be prescribed by the Legislature, and with us, since the act of 1827, laws are *considered* promulgated the day after their publication in the State gazette, (Revised Statutes of 1870, section 2168,) but that publication must be made by authority. The clerk of neither house of the General Assembly has authority to promulgate a law, nor is there any duty imposed on him nor function assigned him, which assists or accelerates the promulgation of a law.

An enrolled bill, with the signatures of the presiding officers of the two houses, is always presented to the Governor for executive action. We have evidence before us in this cause, that the enrolled bill which was numbered two hundred and eighty-seven in the House bills of 1876, was presented to the officer then exercising executive functions, and that it was returned by him to a body without authority to receive it. No other bill or copy is required to have the original signatures of the presiding officers of the two houses except that enrolled bill. The attest, "a true copy," affixed by the Assistant Secretary of State to the clerk's certificate, as it appears in the official journal, must, therefore, refer to that certificate alone.

When the Governor has signed a bill, and thereby made it a law, the original is deposited in the office of the Secretary of State, whose duty is to deliver a copy thereof to the State Printer, but if the Governor has

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not signed it within the time allowed, or vetoed it in the manner constitutionally prescribed to him, and it has become a law by reason of his failure to do either, then it is also his duty to deposit the original in the office of the Secretary of State, and it is that officer who, when he sends the copy to the Public Printer, accounts for the absence of the Governor's signature by a statement of the manner in which it has become a law. If it should happen that a Governor arbitrarily withholds the original, neither signing nor returning it with objections to the proper house, we doubt not it would be competent for the Legislature to avoid the effects of such arbitrary executive non-action, by ordering another enrollment of the identical bill, and have attached thereto the signatures of the two presiding officers, or where that is not practicable, to order by resolution a copy of the bill as it was signed to be deposited with the Secretary of State. But the consequences of holding that any unauthorized person may deposit what purports to be a copy of an act in the office of the Secretary of State, and that the printing of such act constitutes the promulgation of a law, are too manifest to require comment.

The publication of the act numbered as sixty-one in the official journal of the fifteenth instant, is not a promulgation of a law under the circumstances attending that publication.

ON REHEARING.

A rehearing of this cause is ordered by the court of its own motion.

The opinion of the court was delivered by

MANNING, C. J. In the opinion read on yesterday, we held that laws could be promulgated only in the manner prescribed by the Legislature, and by the officers to whom such functions belonged, either from the nature of their offices or because it had been specially confided to them. The publication of the act No. 287 of the session of 1876, in the official journal, was hence declared to be not a promulgation. That act repeals the act creating the Superior District Court.

It appears that the General Assembly at its present session have provided anew for the promulgation of laws by the enactment of law No. 20, the first section of which is as follows:

"That whenever the enrolled copy of any bill shall have been delivered by the Clerk of the House or Secretary of the Senate to the Governor, and said enrolled copy shall not have been returned by him to the House in which it originated, with his objections, within the time provided by law; or whenever the Governor, after delivery to him, has failed to approve the same within the legal delay, and has omitted or neglected to return said enrolled copy to the Secretary of State for promulgation,

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under the constitution, without his signature, that the Clerk of the House or Secretary of the Senate, in which the bill originated, be and is hereby directed to make a duplicate enrolled copy of said law, affixing thereto his certificate that it originated in the House of which he is Clerk or Secretary, and an additional certificate to the fact of the delivery and date thereof by him of said bill to the Governor, and of the failure of the Governor to return the same, as required by law; and upon the delivery to the Secretary of State of said enrolled copy, with said certificate, by the Secretary of the Senate or Clerk of the House, as the case may be, he is hereby directed to promulgate the same."

The mode of promulgation prescribed by this act was followed in the promulgation of the law which repealed the act creating the Superior District Court, and that court is therefore abolished. Without such special legislative provision, we held a promulgation in that form insufficient, and we were ignorant that such provision had been made.

The act thus legally promulgated provides that certain records of the Superior District Court shall be transferred to the Third District Court of Orleans, and the counsel for the relator informed us in argument that an appeal had been lodged in that court in the case before us. We shall therefore modify our decree, entered yesterday, and --

It is now ordered, adjudged, and decreed that so much of our judgment as confirms and perpetuates the prohibition to the defendant, Fischel, from proceeding further in the enforcement of his judgment against the relator until the latter's appeal can be heard, remain undisturbed, and that the mandamus to the judge of the Superior District Court, which was made peremptory, be set aside and rescinded, and the defendant, Fischel, pay the costs hereof.

No. 6558.

CHARLES MADUEL, EXECUTOR, ET AL. VS. P. H. MOUSSEAU ET AL. UNION INSURANCE COMPANY, GARNISHEES.

It is only property in the possession of the garnishee, or a debt *absolutely* due by him, though not exigible, at the moment the interrogatories are served on him, that can be seized under a garnishment process. A prospective, contingent debt can not be reached by such process.

APPÉAL from the Fifth District Court, parish of Orleans. *Cullom, J.*

George L. Bright, for plaintiffs and appellants.

M. M. Cohen and Kennedy & Chiapella, for defendants.

The opinion of the court was delivered by

MANNING, C. J. The Union Insurance Company of New Orleans, was garnished by plaintiffs and answered the interrogatories. The plaintiffs con-

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sidered the answers evasive, and on the second of November, 1875, took a rule on the company to show cause why judgment should not be rendered against it upon the ground that it had failed, neglected, and refused to answer the interrogatories propounded to it. Four days afterward, Achille Chiapella, one of the judgment debtors of plaintiffs, took a rule on them to show cause why the seizure of his wages as president of the company should not be annulled and set aside—the garnishee having answered that he was its president with a stipulated monthly recompense.

The first rule was tried, an appeal taken from the judgment of the lower court, and final judgment rendered in this court in May, 1876. That judgment was, that the interrogatories were sufficiently answered. The second rule was discontinued by Chiapella the following month.

On the thirtieth of May, 1876, plaintiffs' counsel moved to set for trial Chiapella's rule, and that inasmuch as by the answers of the garnishee it was indebted and obligated to Achille Chiapella for salary from July 1, 1875, to May 10, 1876, at four hundred and sixty dollars per month, it was ordered that Chiapella and the insurance company show cause why judgment should not be rendered against them for \$4753 33, the salary due for the time above mentioned, with interest.

The insurance company to this demand pleaded *res judicata*.

The company, answering the second interrogatory of plaintiffs, had said: "The Union Insurance Company of New Orleans does not at present, nor did it at the time of seizure and service of interrogatories, owe any money to the said A. Chiapella. This respondent admits that the said Chiapella is president of the Union Insurance Company of New Orleans and receives from the said company monthly wages amounting to \$460 41 as recompense for his personal services rendered to the said company in his aforesaid capacity of president. But this respondent avers that under the law the said sums monthly due to the said Chiapella as wages are not liable to seizure, and respondent avers that it has no funds or moneys in its possession belonging to or due to the said Chiapella."

The law in force at the time this answer was made provided that the sheriff could not seize "wages nor recompense for personal services." Acts 1874, p. 53. By an amendment of April 4, 1876, the words "laborers' wages" were substituted to that sentence. Acts 1876, p. 124. So the recompense for personal services was not exempted from seizure on the thirtieth of May, 1876, the date of fixing for trial the present issue.

The counsel of the garnishee has rested his defense upon the plea or exception of the thing adjudged, maintaining that the issue decided by this court on the rule for judgment, because of insufficiency and evasiveness of the answers, was in fact and in law an adjudication that the gar-

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nishee had no money or effects belonging to the defendants, or either of them, and since the object of the present rule is to reach what is alleged to be due defendant by garnishee, the identity of object in the two proceedings is established. He also insists that the three other features requisite to support the plea of *res judicata* are present, viz.: identity of parties, of capacity, and of cause of action, and his elaborate brief has conveniently collated for us all the law upon that subject.

The counsel for the plaintiffs in turn forcibly argues that the claim for the salary was not before the court in the pleadings in the former rule, and that the sole question then considered was whether the garnishee's answers were sufficient and unevasive, or in other words whether the garnishee had or had not failed, neglected, and refused to answer. The exception of *res adjudicata* must be determined, he properly adds, upon the issue raised in the pleadings and not by the points made in argument.

The distinction is subtle. The phraseology of the opinion of this court delivered when deciding the former rule favors the view of plaintiffs. The substantial matter then decided favors that of garnishee. We are relieved from the necessity of applying the law relative to the plea of the thing adjudged to the facts of this litigation, because the pleadings and evidence develop an equally fatal and more patent objection to the plaintiffs' recovery against the garnishee.

The seizure was made by service of the interrogatories on the insurance company on the sixteenth of July, 1875. The garnishee answered on the twenty-seventh of the same month that it did not then, nor at the time of seizure, owe any money to Chiapella, and then added that he received from the company monthly wages as president. He had been paid what was due him as recompense for these services before the seizure. The plaintiffs never made any other seizure. None could have been made then. The existing law forbade the seizure of this recompense at the date of answering the interrogatories, and continued to forbid it until April 4, 1876. After its repeal, the plaintiffs, on the thirtieth of May, without a new seizure or other proceedings, move to set for trial the rule taken by Chiapella the previous November, to show cause why the seizure of his salary under the garnishment of July, 1875, should not be dismissed, and that is the motion we are now considering. Chiapella had voluntarily discontinued his rule on the third of June, immediately after service of plaintiffs' motion was made on him, and does not answer this motion nor in any manner object to the hearing, but the insurance company interpose the plea of *res judicata*.

A debt must exist, although the period of its payment may not have arrived, in order to make it subject to seizure in the hands of a garnishee. There must be an existing absolute liability to pay at a future

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time—*debitum in presenti, solvendum in futuro*—and not a prospective, contingent, and conditional liability.

The true test is, what could the debtor recover of the garnishee at the date of the service? On the sixteenth of July the company owed Chiapella nothing. There was a continuing contract, liable to be determined at any moment by various causes, but neither that contract nor the recompense it provided were liable to seizure until nine months after the only seizure was made, and this process must stand or fall according to the state of facts existing at the time of service. *Todd vs. Shouse*, 14 An. 426; *Bean vs. Miss. Union Bank*, 5 Rob. 333; *Rightor vs. Phelps*, 16 An. 105.

In *Coleman vs. Fennimore*, 16 An. 253, it is held that answers acknowledging no present indebtedness to defendant, nor any future indebtedness except contingent upon an uncertain event, will not bind garnishees. But the plaintiffs' counsel maintain that the contract, admitted to exist by the garnishee's answers, for the payment of a monthly recompense for personal services, was seized by his process of the sixteenth of July, and that the repeal of the law exempting it in the ensuing April put that salary in the condition it would have been in if no such law had ever existed, and consequently the seizure was complete. It is not contested that the salary had been paid up to the time of service, but it is contended that the salary which should thereafter become due on a terminable contract, not then liable to seizure, was by the seizure of July subjected to plaintiffs' judgment. We think differently.

In *Marchand vs. Bell*, 21 An. 33, the city of New Orleans was garnisheed and answered that if it was ever indebted to Bell by reason of any contract between them, any amount that might have been due him was forfeited on account of his failure to fulfill his part of it, and on the fifth of September, 1866, the city supplemented its answer by averring that a compromise had been made with Bell under which he was to receive five thousand dollars. Prior to plaintiff's suit, Mackenzie had served garnishment process on the city on the eleventh of May, 1866. Held—that Mackenzie's right was ascertained the moment the city admitted its indebtedness to Bell, and his seizure had priority over Bell's. Here was an indebtedness existing at the moment of Mackenzie's seizure, the amount of which was not ascertained until afterward, but when ascertained reverted back to the moment of seizure and became liable to his judgment. In the case before us there was no existing debt, but merely one that might or would exist provided certain services were rendered, and there was no seizure of any portion of the indebtedness after the rendition of the services had changed the inchoate right of Chiapella into a substantial cause of action.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court is affirmed with costs.

No. 6438.

SUCCESSION OF H. D. COCHRANE.

The clause of a will by which the testator gives a sum of money to a minor, and directs that the sum shall be invested so as to yield a revenue until the legatee's majority, does not involve a *substitution*.

The devise of a certain sum to a minor, and "in the event of her death," to another, is a valid disposition, and not a prohibited substitution.

Where the clause of a will is susceptible of two constructions that one will be adopted which gives effect to, rather than that which avoids the clause.

A naked trust, to be executed immediately, as where furniture is devised to a mother, for the benefit of her minor child, is not a *fidei commissum*.

A PPEAL from the Parish Court, parish of Jefferson. *Hyman, J.*

George H. Braughn and A. J. Villeré, for opponent.

W. B. Lancaster, for the succession.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

HOWELL, J. A motion is made to dismiss this appeal "on the ground that Mrs. Margaret Kellogg, sister of the deceased and one of his residuary legatees, a necessary party to the appeal, has not been cited to answer said appeal or even made a party appellee herein."

The judgment appealed from was rendered on an opposition to an account filed by the executors, sustaining the opposition of Mrs. Echinger, tutrix, to one item and rejecting it as to another. The latter item is in favor of said Mrs. Kellogg and her co-legatee, one of the executors, and it is contended by the appellee that Mrs. Kellogg is a necessary party to the appeal, while the appellants (the executors) contend that Mrs. Kellogg was not a party to the proceedings in the opposition in the court below, and can not be made a party appellee. They say she was not a party because, being a legatee, she was not specially notified of the filing of the account and tableau of distribution and the ordinary publication to creditors does not make her a party.

However this may be, it seems clear to us that all the parties who were before the lower court on the trial of the opposition are before us as appellants or appellees, and we can dispose of the appeal as to them. How they may be severally affected by our action can only be determined when we come to pass on the merits. We do not think the ground urged is sufficient to dismiss the appeal.

Motion refused.

ON THE MERITS.

The opinion of the court was delivered by

MARR, J. We are called upon in this case to construe two clauses in the will of Hugh D. Cochrane, which are as follows:

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"I give to the little daughter of Catherine Echinger five thousand dollars, say \$5000, the said sum to be invested in such a way that she may receive the interest annually and the principal at her becoming of age. In the event of her death, the said donation to go to the daughter of my niece, maiden name Margaret Kellogg, now living in Evansville, Indiana.

"I give to Catherine Echinger four thousand dollars, say \$4000. I also give to her for the benefit of her little daughter all the furniture in my bed-room and bath-room, and all curtains which belong to the set of furniture, two blankets, six linen and six cotton sheets, and everything appertaining to the set of furniture in the room; also one of my dinner services, the decorated set without the monogram."

The executors filed an account and tableau in which they proposed to distribute the effects of the succession as if both these clauses were null. Mrs. Catherine Echinger, as natural tutrix of her minor daughter, Margaret Lenora Echinger, opposed this, and claimed the legacies in favor of her child.

The judgment of the court below recognized the first clause as valid, and ordered the executors to invest the five thousand dollars in the name and for account of the legatee, in such a manner that she shall, during her minority, receive yearly the revenues and the principal at her majority.

The judge considered the second clause a *fidei commissum*, and he adjudged and decreed it to be void and of no effect.

The executors appealed, and Mrs. Echinger, appellee, in her capacity as natural tutrix, answered the appeal, praying for the confirmation of that part of the judgment which recognized the validity of the first clause, and that so much of the judgment as declared the nullity of the second clause be annulled, and that there be judgment declaring the disposition to be valid, and ordering the executors to execute it.

First—It is contended on the part of the executors that the first clause is a double prohibited substitution, first, because the property is to be preserved and returned to the daughter of C. Echinger; second, because it is to be preserved and returned to Miss Kellogg.

No one is charged by the testator to keep and preserve this sum, the five thousand dollars, until the majority of the legatee, and then to return it to her. Whatever the title may be which by this will vests in the little daughter of Catherine Echinger, it vested *eo instanti* on the death of the testator. "I give to the little daughter of Catherine Echinger five thousand dollars." That which follows, "the said sum to be invested in such a way that she may receive the interest annually and the principal at her becoming of age," does not postpone her title to her majority. The testator simply points out the mode in which this fund shall

be administered during the minority, and that which he directs to be done is precisely what the tutor of the minor is required by law to do. He must invest the funds of the minor coming into his hands, and he can not encroach upon the capital, even for the maintenance and education of the minor, without the authorization of the judge on the advice of a family meeting.

The plain meaning of this clause is that the five thousand dollars shall become the property of the child at once. If the disposition had stopped there, the tutrix would have demanded this sum of the executors, and she would have administered it, necessarily, during the minority, because of the incapacity of the child. The testator preferred to have the investment made by his executors. This does not prolong the term of their administration. They are not to have the control of the money except to invest it in such a manner as that the legatee may receive the interest annually. When they make the investment it will be in the name and for the benefit of the child, and the thing in which they make the investment will be the property of the child, as the money invested was, and will be in the custody of her tutrix, who will receive the interest for the child during her minority.

We find no semblance of a substitution in this. It has long been settled that the prohibited substitution is that disposition by which the first taker is charged to keep and preserve the thing during his life, and to transmit it to another at his death. If the money had been given to some one charged to keep it until the majority of the child, and then to give it to her, this might have been a prohibited *fidei commissum*; but it would not have been a substitution. The gift is to the child directly, absolutely, and there is no limitation or restriction of the power of disposal, which belongs to her as owner, beyond that which the law itself imposes during and by reason of her minority.

We interpret that part of this clause which relates to Miss Kellogg as a vulgar substitution; "a disposition by which a third person is called to take the legacy in case the legatee does not take it;" which the Civil Code, article 1521 (1508) declares to be valid.

Article 1714 (1706), of the Civil Code, declares that "a disposition must be understood in the sense in which it can have effect rather than that in which it can have none;" and this is in accordance with the civil law.

Treating "*de rebus dubiis*," the Digest, lib. 34, tit. v., l. 12, Julianus says: "*Quotiens in actionibus, aut exceptionibus ambigua oratio est, commodissimum est id accipi quo res, de qua agitur, magis valeat quam pereat*;" and this is a necessary rule of interpretation.

If the disposition in question were equally susceptible of either of two interpretations, the one making it lawful and valid, the other making it

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unlawful and void, the courts would be compelled to adopt that interpretation which would make it lawful and valid, rather than that which would make it unlawful and of no effect; "*ut res magis valeat quam pereat*."

"In the event of her death." When? We must presume that the testator knew the law, and that he did not intend to violate it or to make nugatory any part of this last solemn act by which he was disposing of his property and effects preparatory to his death. He knew that the legatee would die in the course of nature, as he was about to die. He did not contemplate her death, which he knew would certainly occur, as a mere contingency which might or might not happen. When he used the words "in the event of her death," he had in his mind, not simply that event which is certain with respect to all mankind but an event which was uncertain only as to the period at which it might occur. If he had said: "In the event of her death before the age of majority the said sum is to go to the daughter of my niece," etc., the disposition would have been a substitution. But if he had said: "In the event of her death before my death, the said sum is to go," etc., this would have been a vulgar substitution, a perfectly lawful and valid disposition.

When the testator says "in the event of her death," he evidently means to connect that event with a period of time well fixed in his own mind, as a contingency for which he desired to provide, and had the power to provide. He has failed to express that period; and the courts are compelled to supply this omission. In fixing the period which we must suppose was in the mind of the testator, it is as easy, as reasonable, as natural to say, that he means "in the event of her death before my death," as to say, "in the event of her death before majority," or at any time, happen when it may.

In the first hypothesis, it was perfectly in the power of the testator to provide for the contingency. In the event of her death before he died, the legacy to her would fail, and in that event he desired, and so provided, that it should go to the daughter of his niece.

In the second hypothesis, it would not have been within the power of the testator to provide for the contingency. If the legacy to the little daughter of Catherine Echinger had been coupled with the condition that in the event of her death before the age of majority, or at any time whatever, it was to go to the daughter of his niece, the whole disposition would have failed—would have been void; and neither of these objects of his regard would have taken or been benefited by the intended benefaction.

The testator was at Liverpool, and Mrs. Echinger and her little daughter were in the parish of Jefferson, in the State of Louisiana. He did not know, he could not have known, that the child was actually living at the time he was making his will, much less that she would survive him.

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He desired to give her five thousand dollars; but he did not wish to secure this sum undisposed of in the event of the death of the child during his life, and the consequent failure of the legacy to her. He therefore provided, by vulgar substitution, that this sum should in that event go to the daughter of his niece.

The law requires us to give effect to this disposition if it can be done. In order to do this we have but to assume that the testator did not intend to make a disposition in violation of a prohibitory law, and therefore of no effect; and that he simply intended to name a person to take as legatee in the event that the little daughter of Catherine Echinger should not be living at the opening of his succession by his death.

Second—It is contended also, that the second clause is a trust; and that all trusts are *fidei commissa*, and are prohibited.

The prohibition of the Code is leveled at these fiduciary bequests, *fidei commissa*, by which the legatee is used merely as the means of transmitting to one incapable the property which is given to the legatee only for that purpose; and at the tenures by which property is tied up for a length of time in the hands of individuals, and placed out of commerce. It never was the object of the Code "to abolish *naked trusts*, uncoupled with an interest, which are to be executed immediately." *Mathusin vs. Livaudais*, 5 N. S., 302; *succession of Franklin*, 7 An.; *succession of McDonogh*, 8 An.; *Henderson vs. Rost*, 5 An.

The testator had given five thousand dollars to the daughter of Catherine Echinger. He had not chosen to allow this money to fall into the hands of the mother, the natural tutrix, because he desired it to yield an annual income for the maintenance and education of the child; and he had more confidence in the capacity of the executors to make this investment in such a manner as to secure his object, than in that of the mother, necessarily of less experience in such matters than the persons to whom he had intrusted the execution of his will. But the special legacy of the furniture, etc., was of much less importance. If he had given these movables to the child directly, they would necessarily have fallen into the hands of her mother, her tutrix, and when he gave them to the mother for the benefit of the child, the effect was precisely the same as if he had given them directly to the child. In other words, he imposed upon the mother, with respect to these movables, the same obligations as would have devolved upon the executors if he had given them directly to the child. In the language of the court in *Mathusin vs. Livaudais*, 5 N. S., 303:

"The obligations imposed on the legatee by the will of the testator in this case can not be distinguished from that of an executor, except in the name; and it is the duty of the court to look to things rather than to words."

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It is the duty of the mother to execute this trust immediately. We do not see how any rule of law or of policy is contravened by this disposition; and the moment the mother comes into possession the trust will be executed in accordance with the intention of the testator. The mother will hold and possess for her child as natural tutrix, not as trustee under the will; and she will be responsible for the property and effects, not as trustee under the appointment of the testator, but as natural tutrix under the law.

It is therefore ordered, adjudged, and decreed that the judgment appealed from, in so far as it relates to the legacy of five thousand dollars, given to Margaret Lenora Echinger, the little daughter of Catherine Echinger, be affirmed. That said judgment, in so far as it declares void the legacy given to Catherine Echinger, for the benefit of her little daughter, be avoided and reversed; and that the said legacy be recognized as valid and obligatory. That the executors of the last will and testament of Hugh D. Cochrane be ordered to execute the same by delivering to Catherine Echinger, for the benefit of Margaret Lenora Echinger, her little daughter, the furniture and effects given by the said will to the said Mrs. Catherine Echinger for the benefit of her said child, according to the tenor and terms of the said will, and as therein set forth and described, and that the appellants in their capacity as executors pay the costs of this appeal.

No. 6600.

SUCCESSION OF HUGH McCLOSKEY. OPPOSITION OF MRS. ALICE McCLOSKEY.

A donation of future property, contained in a marriage contract, is not a legacy. It is a donation *inter vivos*, and at the death of the donor becomes a debt of his succession.

APPEAL from the Second District Court, parish of Orleans. *Tissot, J.*

T. Gilmore & Sons, for the executors and appellees.

James Timony, for opponent.

The opinion of the court was delivered by

SPENCER, J. The decedent, Hugh McCloskey, and "Mistress Alice B. Grant," before their marriage, entered into a marriage contract before William J. Castell, Esq., notary public, of which the following is one of the stipulations:

"Fourth—In consideration of the marriage, and of the love and affection which the said future husband bears to his said future wife, he does by these presents donate to his said intended wife the sum of \$10,000

(ten thousand dollars), in the event that she should survive him, said sum to be taken from the mass of his succession."

They were married and she survived him.

Is the ten thousand dollars a debt of the succession, or is it a legacy?

The executors say it is a legacy. The opponent says it is a debt of the succession.

The executors contend that this is a donation of future property by marriage contract, and that it is, therefore, testamentary in its character, and to be paid as a legacy and concurrently with other legacies. The opponent contends that it is a donation *inter vivos* of present property, suspended by a condition, and that the condition, to wit: survivorship of donor, having happened, it is a debt of the estate and bears interest from donor's death.

The rules of our Code governing this case are to be found in the general provisions relative to "donations *inter vivos*," and more especially in chapters VIII. and IX. of Title II., Book III., of the Civil Code, entitled, respectively, "Of donations made by marriage contract to the husband or wife and to the children to be born of the marriage," and "Of donations between married persons, either by marriage contract or during the marriage."

We agree with the counsel for the executors that the disposition in question is a "donation of property in future." It is a donation of a "sum to be taken from the mass of his succession," so that the donee has no right which she could enforce during the life of the donor, and a right dependent upon his death and upon his succession. If he died without property, at the time of his death, there was no recourse for her.

But because the donation is "of future property," it does not follow that the donation is testamentary—that it is a legacy.

Donations by marriage contract are not classed by the Code under the title of testaments. They are not subject to the forms prescribed for any kind of testament, but simply required to be passed before a notary and two witnesses, like other donations, O. C. C., 2308. Article 1738, O. C. C., declares that, "A donation of property in future * * * made between married persons by marriage contract, * * * shall be subject to the rules established by the preceding chapter (VIII.) with regard to similar donations made to them by a third person," etc. The rules established and referred to are found in article 1728, O. C. C. This article of our Code corresponds to article 1082 of Code Napoléon. Commenting on the articles of this chapter (VIII.), Mercadé, vol. 4, p. 210, says:

"On a vu sous l'acte 893, No. 11, que, malgré l'opinion contraire de Merlin et de Toulin, il n'existe plus, sous le Code, de donations à cause de mort; et que les libéralités exceptionnelles dont s'occupent notre chapitre

et le chapitre suivant ne sont toujours que des donations entre-vifs, qui restent soumises aux règles ordinaires pour tous les cas qui ne sont pas l'objet d'une dérogation formelle."

Again he says, commenting on article 1082, C. N., (corresponding to 1728 aforesaid) :

"Aujourd'hui, comme le prouvent et l'article 893 et la subrique de notre chapitre, et les articles 1082, 1083, 1089, ce n'est plus là qu'une donation entre-vifs, *une donation de biens à venir*; et c'est par les règles générales des donations, non par celles des successions ou des testaments, qu'il faudra suppléer aux règles spéciales de cette manière de disposer." Vol. 4, p. 212.

We accept these views as being the true exposition of the law, and as in consonance with the provisions of our Code. We have examined with care the cases in our own courts referred to by the counsel of executors, and we find nothing in them to change our views of the provisions of our Code, under which we think the ancient "*institution contractuelle*" no longer exists.

In *Fowler vs. Boyd*, 15 L., 562, this court held that a universal donee under a marriage contract, like a universal legatee under a will, is by mere operation of law seized of the whole estate, in the absence of forced heirs, and no demand of possession is necessary of the heirs at law.

In *Criswell vs. Seay et als.*, 19 L., 528, where the husband, having then living two children of previous marriage, makes, in his marriage contract, a donation to his future wife, of "all the property of whatsoever kind and description he may die possessed of, and which may lawfully be given by act of donation according to the laws of Louisiana; that is to say, of all his property that he may die possessed of, and which he is or may be entitled by law to dispose of *mortis causa*, and which portion will be determined by the number of heirs that he may leave at his decease." It was held by this court that the two children, his only forced heirs, having died before him, his surviving wife became his universal donee and entitled to his entire estate. That the capacity to make such a disposition, as to its amount, must be determined by reference to the time of the donor's death, because it is not till then that the donation is to take effect. True, the court arrives at this last conclusion by deducing it from the rules of our law in reference to testamentary dispositions, and says that it is a donation *causa mortis*. But we do not see that this is to say that it is a *testamentary disposition*. On the contrary, we think it is not. It is undoubtedly a donation to take effect on the death of donor. It is a contract, an *irrevocable act*, depending upon the happening of a future event, to wit: the predecease of the donor; and while possessing some features resembling in their effects testamentary dispositions, yet clearly distinguishable from them.

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We, therefore, conclude that the disposition in question is a donation *inter vivos*, taking effect at the death of the donor. That the donee is not a legatee, but a creditor of the estate, and as such entitled to be paid by preference to the legatees, and with legal interest from the death of the donor, Hugh McCloskey.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended, and it is now ordered and decreed that there be judgment sustaining the opposition of Mrs. Alice McCloskey to the fifth provisional account of the executors, and that she be placed thereon as a creditor for ten thousand dollars, with five per cent interest to date from death of Hugh McCloskey, and that she be paid by preference to the legatees of said decedent, and that in other respects said account be homologated. It is further ordered, that the executors pay costs of both courts.

ON APPLICATION FOR REHEARING.

The opinion of the court was delivered by

SPENCER, J. A donation by the husband to the wife, by marriage contract, of future property, leaves the husband the right to sell or mortgage the property so given, "unless he has formally barred himself of it in whole or in part." O. C. C., 1729.

If in express terms he "bars himself" from selling or mortgaging the thing given, it differs from an ordinary donation only in this that it depends upon the survivorship of the donee, and the donor is not dis seized of the property immediately. The mere fact that the donation made without such bar to alienation, leaves the donor free to sell or mortgage, does not prevent its *creating an obligation on him*. An ordinary donation of a sum of money, payable on a future day or on the happening of a future event, does not prevent the donor from selling or mortgaging his property, but it does certainly create a debt against him.

So in this case the donation by Hugh McCloskey of ten thousand dollars, payable out of his succession, to his wife, though not preventing him from selling or mortgaging his property (because he did not thus bar himself), created an *irrevocable obligation* on him during his life, and on his estate after his death. So binding is this obligation that article 1729, O. C. C., forbids him to dispose of his property to her prejudice "by gratuitous title." Yet we are asked in this case to permit him to do what the law says he can not do. We are asked to give effect to his will a *subsequent "gratuitous title"* to the prejudice of this donation; to allow him to dispose "on gratuitous title" of the thing previously given by marriage contract—which the law says explicitly he can not do.

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This donation must be preferred to the legacies, or else we must expunge article 1729 from the Code.

We therefore adhere to our previous opinion that the donation in this case created an *obligation*, a debt, due at the death of Hugh McCloskey, and that under the general law it bears five per cent interest from the time it was due. It is concededly not a legacy, and, so far as we can see, has none of the effects of a legacy, except that it is payable after death of the donor out of his succession. It certainly is payable in preference to legacies, which are subsequent "*gratuitous dispositions*." We are not called upon to decide whether it would be liable to reduction or defeat by debts of the donor. Perhaps such debts would have a preference over the donation, but that does not prevent the donation having a preference over the legacies.

The rehearing is refused.

No. 5435.

CITY OF NEW ORLEANS VS. JOHN A. MORRIS.

A claim of ownership set up by a third person to certain property sought to be attached in a suit, can not be adjudicated on a rule tried in vacation.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J.*

George S. Lacey, for plaintiff and appellee.

C. T. Buddecke, for Germania National Bank.

B. R. Forman, defendant in rule.

The opinion of the court was delivered by

MORGAN, J. Two writs of *fieri facias*, which were the basis of the garnishment process by which the Germania National Bank was proceeded against, were offered in evidence on the trial in the court below. These writs are not in the record. A writ of *certiorari* issued to cause the omission to be rectified. The writ failed.

Under these circumstances, we prefer, on our motion, to issue another writ ordering their production.

It is therefore ordered that a writ of *certiorari* issue to the clerk of the Superior District Court directing him to attach to the record in this case the two writs of *fieri facias* mentioned in the writ heretofore issued at the instance of the appellants.

SPENCER, J. The city of New Orleans having judgments against defendant for taxes, issued writs of *fieri facias*, and propounded interroga-

tories to the bank as garnishee. After propounding the usual interrogatories touching indebtedness to the defendant, the following "fourth interrogatory" is propounded:

"Are you not the holder of four promissory notes of two hundred and fifty dollars each, dated fifteenth of November, 1873, payable respectively on the first of July, August, September, and October, 1874, to bearer, at bank, in New Orleans, signed John P. Becker, and indorsed, 'for collection, B. R. Forman, agent?'"

All the other interrogatories having been answered *no*, this one was answered: "The bank has three such notes, which were deposited by B. R. Forman, agent; that since the service of the interrogatories, the note due first of July has been paid and proceeds placed to the credit of B. R. Forman, agent, and this respondent has no knowledge whatever whether or not John A. Morris, the defendant in execution, has any right, title, and interest, directly or indirectly, in the said notes; and respondent knows no other owner of said notes than said B. R. Forman, agent."

When this answer was filed, the city of New Orleans, showing that the bank made garnishee admitted having three of the notes described in the fourth interrogatory, and without alleging that J. A. Morris, the defendant in execution, was the owner of these notes, or had any interest in them, obtained an order on the bank to show cause why it should not be condemned to deliver said notes, or their proceeds, into the hands of the sheriff.

The bank, answering this rule to show cause, re-affirmed in substance its answers to the interrogatories, and set up further that one Mrs. Hemen, and B. R. Forman, agent, had sequestered the notes on a claim of ownership, and asked to have Forman, the depositor of said notes, made party, and thereupon the court so ordered. Forman excepted to being made party by motion, averring that his title to the notes could not be thus tried and questioned, and that this case could not be tried, heard, and determined at chambers and in vacation.

The court, notwithstanding, tried the rule on the eighteenth of July, 1874, made it absolute, ordering the garnishee to deposit the notes or their proceeds in the sheriff's hands, and dismissing Forman's exceptions. From that judgment this appeal is taken.

The plaintiff, on trial, offered the two writs of *fiery facias* against Morris forming the basis of the proceeding in garnishment. The clerk certifies that these writs are lost or mislaid, and that after diligent search they can not be found, and therefore they are not copied in the record. This court, our predecessors, ordered a writ of *certiorari* to issue, which failed. It, of its own motion, ordered a second writ, with same result. The case is now submitted to us. Plaintiff insists that the appeal should

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be dismissed, but we think this would be an injustice. We think that the judgment is, on the face of the record, a nullity. The court could not try and determine such a case as this in vacation. See 23 An. 483; Dixon vs. Judge, Opinion Book 43, page 90.

It is therefore ordered and decreed that the judgment appealed from be annulled and avoided, and this cause remanded to be proceeded with according to law, plaintiff and appellee paying costs of appeal.

No. 6349.

STATE EX REL. THE ATTORNEY GENERAL AND THOMAS CAREY VS. JOHN BARROW.

The Governor has discretionary power to remove a tax collector, and appoint his successor. In the absence of the Governor from the State the Lieutenant Governor has a similar power.

A PPEAL from the Superior District Court, parish of Orleans. *Lynch, J.*

A. P. Field, Attorney General, and *Cotton & Lery*, for relator and appellant.

Charles S. Rice, for defendant.

The opinion of the court was delivered by

WYLY, J. In this proceeding under the intrusion act for the office of tax collector of the Third District of New Orleans there was judgment for defendant, and plaintiffs appeal.

Thomas P. Carey was appointed to said office on the eighteenth of January, 1876. On the tenth of May defendant was appointed (vice Carey, removed,) by the Lieutenant Governor, acting as Governor in the absence of the Governor from the State.

The question as to the authority of the Governor to remove a tax collector and appoint his successor is no longer an open one. 25 An. 119; 25 An. 396; 26 An. 537.

In the absence of the Governor from the State in this instance the Lieutenant Governor could discharge the duties of the office of Governor. Constitution, article 53.

It is unnecessary to examine the bills of exceptions to the exclusion of evidence at the trial, because if all the testimony, the rejection of which is complained of, were adduced it would not alter the result.

Judgment affirmed.

ON REHEARING.

The opinion of the court was delivered by

MARR, J. In January, 1876, Thomas Carey was appointed by the Gov-

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ernor, by and with the advice and consent of the Senate, tax collector for the parish of Orleans, Third District. In May of the same year John Barrow was appointed by the Lieutenant Governor to the same office, *vice* Thomas Carey, removed. The object of this suit is to determine the right to this office.

The relator insists on these propositions:

First—That the power to remove tax collectors, which is vested in the Governor, can and should be subject to judicial control; that the officer can be removed only for cause, and it is competent for the courts to inquire whether or not there was cause for removal.

Second—That in this case the Lieutenant Governor had no right to remove Carey and appoint Barrow.

First—The office of tax collector is created by statute, and the term is two years; but for “refusing or failing to do his duty,” as prescribed by the act, the officer “shall be liable to dismissal from office by the Governor.” Rev. Stat., sections 1592 and 1593.

This precise question was before this court in Doherty’s case, 25 An. 119, and we think it was correctly decided that this statute invests the Governor with discretionary power to determine when the contingency has occurred which authorizes him to dismiss the tax collector, and the appointment of another to the same office, *vice* the late incumbent removed, is the proof of the existence of sufficient cause for removal.

It is urged that this power is subject to abuse; and that is true of all discretionary power. The executive, upon his responsibility, decides in the last resort that cause of removal exists, and under the sanction of his official duty and obligation he exercises the power which the Legislature has chosen to confer upon him, and in the exercise of which he can not be controlled by the judiciary.

The case is different with offices created by the constitution, the incumbents of which can be removed only in the mode prescribed by the constitution.

Second—It is in proof that the Governor was absent at the city of New York, where he remained some four or five weeks. By the constitution, article fifty-three, in case of the absence of the Governor from the State “the powers and duties of the office shall devolve upon the Lieutenant Governor until the absent Governor shall return.” The case contemplated by the constitution had occurred, and whatever power could have been exercised by the Governor had he been present, the same could have been lawfully exercised by the Lieutenant Governor in his absence.

Graham’s case, 26 An., relied upon by the relator, differs essentially from this. In that case the Governor was at Pass Christian, in the State of Mississippi, but a few hours run from New Orleans. In this case the

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Governor was more than a thousand miles distant, and his absence, instead of being for a few days only as in Graham's case, was for four or five weeks. We express no opinion as to the correctness of that decision; we mean to say merely that it is not applicable to this case.

The decision in Doherty's case has been uniformly adhered to, and we think it rests upon well-established principles.

It is therefore ordered that the decree pronounced in this case by our predecessors be and remain undisturbed.

No. 6552.

SARAH A. BLAKE VS. S. O. & T. A. NELSON ET AL.

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Where a wife, separate in property, seeks to annul her transfer of paraphernal property to her creditors, made according to the forms of law, on the ground that the consideration of her transfer was the debts of her husband, the burden of proof is on her, to show in the most positive manner, the truth of what she alleges.

Authentic acts, passed by a plaintiff or defendant, which recognize, or affirm a previous act passed by the same party, are admissible in evidence against him.

Any competent judge, other than the judge of her residence may authorize a wife, in the absence of her husband, who has no domicile in the State, to form a contract, or institute a suit.

The action to annul a contract on account of lesion, is prescribed in four years.

Before a party can annul his contract, he must restore what he has received under the contract, and place the other parties in interest in the position they occupied previous to the contract.

APPPEAL from the Thirteenth Judicial District Court, parish of Madison. *Hough, J.*

Montgomery & Delaney, for plaintiff and appellee.

James T. Coleman and *G. L. Hall*, for defendants.

The opinion of the court was delivered by

MARR, J. In January, 1867, a petition was presented to the Fourth District Court of New Orleans in the name of Mrs. Sarah A. Blake, signed by Hynes & Gordon as her attorneys, stating substantially:

That petitioner was the wife of Conway R. Nutt, residing in Madison parish, separate in property from her husband; that she was largely indebted to certain parties in New Orleans, with whom she had an opportunity to make a settlement on favorable terms; that her husband was absent, and had been absent from the State several years, and that his residence was unknown to her, so that she could not obtain his authorization. The prayer was that she be authorized by the judge to make and sign such act of sale as might be requisite for the purpose stated, and the authorization was granted as prayed for.

On the fifteenth of January Mrs. Blake, by authentic act, passed before Cuvellier, notary, in which this authorization is set forth, conveyed

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to Andrew R. Hynes, agent for the creditors named and designated, the Ditchley plantation, situated in Madison parish, her paraphernal property, with the exception of two hundred acres, including the dwelling, which she reserved to herself, "free from the incumbrance of the parties for whose benefit this sale is made," the purpose being, as declared, "the payment, by preference over all other debts and liabilities, of the debts specified, due to a number of creditors, including fifteen hundred dollars for attorney's fees, the whole aggregating \$37,941 58.

It was stipulated that Hynes should sell the property whenever he should be required to do so by the creditors represented by him, and apply the proceeds according to the terms of the act, and on the fifth of August, 1867, he did sell it to Henry Harvey for ten thousand dollars cash.

The certificate of the recorder, incorporated in the act of the fifteenth of January, shows that there were but two incumbrances on the property:

First—A special mortgage in favor of Rotchford, Brown & Co., dated eleventh of March, 1858, to secure a note for \$6180 10, bearing interest at eight per cent, due in November, 1859.

Second—A special mortgage in favor of S. O. Nelson & Co., dated fourth of September, 1858, to secure advances for the purposes of the plantation, to be made in that year or any future year, not exceeding twenty thousand dollars at any one time.

In March, 1873, Mrs. Blake brought this suit against Mrs. Mary Harvey, widow of Henry Harvey, and tutrix of their minor children, and against the several creditors for whom Hynes had been agent and attorney-in-fact, to have the act of the fifteenth of January, 1867, declared to be null and void, and to recover the property conveyed by her to Hynes, and rent from the date of that act.

The grounds set up in the petition are substantially:

First—That the debts mentioned in the act of January 15, 1867, were contracted by her husband, and not by her.

Second—That the law prohibits the wife to bind herself or her property for the debts of her husband.

Third—That Hynes was her confidential friend and legal adviser; that he induced her to accompany him to New Orleans for the purpose of settling these debts, representing to her that she was bound for them, and that she was in danger of being sold out of house and home, and that Hynes was in fact the agent and representative of the creditors, and was acting in their interest.

Fourth—That the application to the judge of the Fourth District Court for authorization was without her consent.

Fifth—That the Fourth District Court of New Orleans was without

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jurisdiction to grant this authorization, because her domicile was in Madison parish.

Sixth—Lesion beyond moiety.

Defendants excepted on several grounds, one of which is that plaintiff must first offer to restore the purchase money, and put the defendants in their original position before she can carry on this action.

They also pleaded the prescription of one, three, and five years, which we do not find it necessary to pass upon. We incline, however, to the opinion that the prescription of ten years, as established by article 2221 of the Revised Civil Code, is applicable to the causes of nullity alleged, except lesion.

The creditors represented by Hynes disclaimed any interest in the controversy, and Mrs. Harvey took upon herself the burden of the defense. After a general denial, she pleaded specially: That several years before the war plaintiff began business with S. O. Nelson & Co. as her factors and commission merchants; that they made advances of money and supplies for the Ditchley plantation, her separate property; that they kept the account in her name; that she was authorized to borrow money and execute a mortgage in favor of S. O. Nelson & Co. to secure twenty thousand dollars; that after the close of the war, in January, 1866, she was indebted to S. O. Nelson & Co. in account \$4128 96, besides supply notes held by the several creditors specified in the act of the fifteenth of January, 1867, the whole aggregating in capital \$32,075; that these notes were drawn by and also bore the name of her husband, C. R. Nutt, authorizing her; that in addition to these debts there was a preferred claim on the plantation of over four thousand dollars which had to be immediately arranged; that all of these claims were placed in the hands of Andrew R. Hynes by the holders and owners, with instructions to foreclose the mortgage and recover the debts; that plaintiff, desirous to save a portion of the plantation, with the residence, urged a compromise upon said creditors, and they, unwilling to distress her and deprive her of a home, finally consented, and, to effect this compromise, she filed her petition in the Fourth District Court of New Orleans and obtained the order authorizing her to make the sale of the property.

That Hynes, by instruction of the creditors, offered the property for sale, and gave the utmost publicity to it by advertisements in the papers of New Orleans, Memphis, Louisville, and St. Louis, and finally sold it to Henry Harvey, for ten thousand dollars cash. Defendant alleges that Harvey made this purchase in the utmost good faith; that the price he paid was as much as the property was worth; that the proceeds of the sale were applied to the debts, and the notes and other evidences of debt were surrendered into the hands of plaintiff, and she was thus acquitted of more than thirty-two thousand dollars of her debts secured by

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mortgage on the plantation and left in the quiet possession of her residence and two hundred acres of land.

Defendant prays that she be quieted in the title and possession of the property, or in the event that the title be declared invalid, that the ten thousand dollars paid by her husband, and applied to the liquidation of plaintiff's debts, be returned to defendant with interest.

The judgment of the court below, from which Mrs. Harvey appealed, awarded the land to plaintiff and rejected the demand for rent, and that of Mrs. Harvey for the return of the price.

Plaintiff's counsel took a bill of exceptions to the ruling of the court admitting the deposition of S. O. Nelson. We think the court erred, but it is not necessary to state the objections, because we shall not consider this testimony or allow it to influence our decision.

Defendants offered in evidence a donation made by plaintiff to her children on the nineteenth of March, 1867, of the two hundred acres reserved in the act of the fifteenth of January, 1867, to which plaintiff objected, on the ground that it was *res inter alios*. This act was a recognition and confirmation of the act of fifteenth of January, as we shall see hereafter, and it was properly admitted in evidence.

Plaintiff also objected to the introduction in evidence of the mortgage by plaintiff in favor of Rotchford, Brown & Co., on the same ground, and they objected to the mortgage in favor of S. O. Nelson & Co., on the ground that it had no connection with the debts for which the land was sold. These two mortgages were the only incumbrances mentioned in the act of the fifteenth of January, 1867, as recorded against this property, and the production of the instruments themselves afforded the best evidence that the property was actually incumbered by them.

Manifestly the burden of proof was on plaintiff to show the nullity of the act by which she conveyed the property in question to Hynes, and it is not enough for her to allege that the debts which she discharged by that act were the debts of the husband. Where community exists the legal presumption is that all debts contracted during the marriage are debts of the community, for which the wife is not liable, but where community does not exist, of course there can be no such presumption.

In this case Mrs. Blake obtained judgment against her husband in 1844, under which she purchased and became the owner of Ditchley plantation, and that judgment separated her in property. Debts contracted by her, with the authorization of her husband, for the plantation, were *prima facie*, at least for debts, and the documentary evidence in the record would suffice to charge her with the liability, if the suit were against her.

In the act of donation to her children, nineteenth March, 1867, which was made with the authorization of the judge of the district court of

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Madison parish, Mrs. Blake refers to the act of fifteenth January, passed before Cuvellier, "*under authority of an order granted in the absence of her husband from the State of Louisiana by the Fourth District Court of New Orleans.*" She states that by this act she sold or gave in payment to Andrew R. Hynes, "*as attorney-in-fact of certain creditors of appearer, with the reservation to appearer of about two hundred acres, and the improvements thereon,*" the Ditchley plantation, etc.; and that by said "act of sale or giving in payment *all the debts of appearer were extinguished, and the said two hundred acres, more or less, with improvements, rendered free from all liabilities or incumbrances of appearer.*"

She also states in this act that her husband, "now a resident of the State of Texas," was absent in fact from the State of Louisiana:

The mortgage in favor of Rotchford, Brown & Co. recites that it was executed by plaintiff with the authorization of the judge of her district and of her husband; that the debt was for advances made to her, and was liquidated by her note, countersigned by her husband.

The mortgage in favor of S. O. Nelson & Co. on its face is in strict conformity to the act of 1855, articles 126, 127, 128 of the Revised Civil Code, and the judge who granted the authorization states that he examined Mrs. Blake *under oath*, separate and apart from her husband, touching the object for which she desired to give the mortgage, and ascertained from her declarations, to his satisfaction, that it was not for any debt of her husband.

In an action against the wife, the exhibition of a mortgage, executed by her, with such strict observance of the requirements of the law, would create a presumption of indebtedness against her which it would require the most positive and satisfactory proof to rebut if it would not absolutely conclude her. How much greater the necessity for such proof, on her part, when she sues to annul her solemn acts, and to avoid a compromise by which she and her property were relieved of this apparent indebtedness.

In the act of fifteenth of January Mrs. Blake acknowledged her indebtedness and the incumbrance on her property, and as these two mortgages were the only incumbrances recorded against the property she could have referred to none other. In the act of nineteenth March, 1867, she refers to the act of fifteenth January as the means by which all her debts had been extinguished, and the two hundred acres of land, reserved to herself by that act, rendered free from all liabilities and incumbrances.

So far as the charges against Hynes are concerned, if proven, they ought not to prejudice the rights of the widow and children of Harvey. But we think Mrs. Blake has much less cause of complaint against Hynes than the allegations of her petition indicate. The statement that

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the application to the Fourth District Court was without her consent must be attributed to a defective memory. She availed herself of the authorization thus obtained in the solemn notarial act passed the next day, in which it is mentioned and set forth as the evidence of her power and capacity to make that precise contract, the only purpose for which it was intended; and two months after, in another solemn notarial act, she refers to it again with a circumstantiality which precludes the possibility of ignorance, either of the means by which this authorization was obtained, or of the purposes for which it was intended. If she did not specially authorize Hynes & Gordon to make this application, these two acts, the one passed in New Orleans, the other in Madison parish, show beyond her power of denial that she fully understood and approved and ratified what had thus been done in her name and behalf.

In both these acts she states that Hynes was agent and attorney for the creditors whose claims had incumbered the entire plantation, her property. Hynes certainly did not conceal from her his relations to her creditors; and it is not improbable that she obtained better terms from him, her confidential friend, than would have been granted by a stranger, the mere attorney of her creditors. She desired to secure a home; and she accomplished this, after protracted negotiations; and she and her creditors constituted Hynes their trustee to carry into effect the compromise and settlement which they had agreed upon.

Mrs. Blake was examined as a witness in her own behalf, and her testimony proves that Nelson & Co. furnished the supplies for her plantation. She says she and her husband signed these notes during the business with Nelson & Co., and she supposes they were intended for supplies and advances for the plantation. Her repeated acknowledgment of these debts, in public notarial acts, coupled with the fact that they were contracted with the authorization and assistance of her husband, and the sanction of the judge of the district and parish in which she resided, relieves Hynes of the imputation of having taken an unfair advantage of her in representing that she was bound for them. There is no proof in this record which creates a doubt as to the truth of this representation.

As to the jurisdiction of the Fourth District Court, article 132 of the Revised Civil Code empowers "the judge," when he is satisfied that the husband is absent, to authorize the wife to sue or be sued, or to make contracts. This means, not that the judge shall grant a general authorization to the wife, but that when it becomes necessary for her to appear in court to sue or to defend a suit, or to make a contract, the judge may grant the authorization for the special case and purpose.

All the articles of the Code which provide for the judicial authorization of the wife use the term "*the judge*," without other designation or quali-

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fication; and counsel assume that this means the judge of the domicile. This assumption will not stand the test of criticism. Article 3556, which is devoted to the explanation of the terms used in the Code, and not therein defined, declares (No. 17) that "the word *judge*, as employed in this Code, means always the competent judge."

There are cases in which the wife must be sued at her domicile or usual place of residence, and there are cases in which the jurisdiction would be vested exclusively in some judge exercising his functions in a parish different from that in which she resides, and in which she would be a necessary party. No judge is specially vested with jurisdiction of suits in which married women are parties. The jurisdiction is established by general laws, applicable to all cases and persons falling within their purview, and they determine the competency of the judge in each particular case.

When a married woman is to be sued, her husband must be sued with her; and if he appears and assists her in the defense, no other authorization is required. Should he be absent, the plaintiff must demand that she be authorized by the judge before whom the suit is brought. R. C. P., art. 118.

The general rule is that every one must be sued before the judge having jurisdiction over the place of his domicile or usual residence; and, in ordinary civil matters, where the wife is to be sued, and her husband is absent, the authorization must be by the judge of the domicile or usual residence. R. C. P., art. 162.

In the cases contemplated by article 163 the suit may be brought, at the option of the plaintiff, either at the domicile of the defendant or in the parish in which the real property, the subject of the litigation, is situated.

There are other cases specified in articles 164 and 165 of the Revised Code of Practice in which suit must be brought without reference to the domicile of defendant. Therefore, when article 132 empowers the judge to authorize suit to be brought against a married woman whose husband is absent, it means the competent judge; that is, the judge before whom the suit is to be brought, as declared by article 118, Revised Code of Practice. It follows that "the judge," or the competent judge, simply means the judge having jurisdiction of the cause.

Article 124, Revised Civil Code, declares that if the husband refuses to empower his wife to appear in court the judge may give such authority. This means the judge of her domicile only in the cases in which she is to appear before him. It necessarily means the judge having jurisdiction of the cause, whether the wife is to appear as plaintiff or as defendant, whether the suit be brought at her domicile or in some other parish, in accordance with the general laws regulating the jurisdiction of the courts.

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Article 125, Revised Civil Code, which, like article 124, contemplates those cases only in which the husband is not absent, declares, if the husband refuses to authorize his wife to contract, she may cause him to be cited to appear before the judge, who may authorize her to make such contract, or refuse to empower her after the husband has been heard, or has made default. As the husband must be cited before the judge of his domicile, that judge alone would have jurisdiction under this article. This was decided in *Fowler vs. Boyd*, 12 La. 70; but we can not assent to the doctrine asserted in that case, that the parish judge of the domicile is vested with exclusive jurisdiction.

The act of 1855, Revised Civil Code, articles 126, 127, and 128, requires the wife, when she desires, in addition to the authorization of her husband, to be authorized judicially to contract a debt for her separate benefit, and to secure it by mortgage or other incumbrance on her separate property, to be examined, apart from her husband, by the judge of the district or parish in which she resides, according to the amount of the debt; and, of course, no other judge has jurisdiction in this case. This law relates, exclusively, to those contracts by which the wife becomes a debtor, and binds her separate property as security; and it contemplates not only the presence of the husband, but his authorization.

Article 132 differs from those just cited, in that they provide for cases in which the husband is present, and has the power and capacity to authorize his wife, while article 132 relates, exclusively, to cases in which the husband can not authorize his wife, either because he is absent or under interdiction. It enables the judge, where the husband is either absent or under interdiction, to remove the incapacity of the wife, for the special occasion, just as articles 124 and 125 empower him to do where the husband is present and refuses to authorize her. The judge, who, under article 132, may authorize the wife to sue or be sued, must mean just what the same words imply in article 124, which empowers the judge to authorize her to appear in court; and that is, the judge before whom she is to appear, whether as plaintiff or as defendant, the judge having cognizance of the cause, no matter in what parish he may exercise his functions.

The case is different where the wife is to be empowered to make a contract. When she proceeds, on the refusal of her husband, under article 125, she causes him to be cited. There is a suit, a *contestatio litis*; and the judge of his domicile or usual residence is vested with exclusive jurisdiction. When she proceeds under article 132, her husband being absent, she can not cause him to be cited; there is no suit, no issue made with any one, no *contestatio litis*. Her application is purely *ex parte*, and there is no reason why she should make this application to the judge of

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the parish in which she resides, rather than to the judge of the parish in which she finds it convenient to make the contract.

The condition of the married woman who lives apart from her husband is anomalous. The Code, article thirty-nine, declares that: "A married woman has no other domicile than that of her husband," and this is copied from the Code Napoleon, article 108, in which the strong negative, "*n'a point d'autre domicile*," is not more exclusive of the legal possibility of a separate domicile than our English version, "*has no other domicile*."

A voluntary absence of two years is a forfeiture of domicile within the State. R. C. C., article 46. In 1867 the husband of Mrs. Blake had been absent from the State for several years, and he had no longer a domicile in the State. The law does not say a married woman has no other domicile than that of her husband "*so long as he resides or has a domicile in the State*;" nor does it mean any such thing. Article 120 says: "The wife is bound to live with her husband, and to follow him wherever he chooses to reside." The plain meaning of the law is that the married woman, by reason of this legal and social obligation, by reason of the disability inseparable from her status and condition, has neither the right nor the capacity to create or establish a domicile for herself, and that she is bound to accept that of her husband; and this incapacity, not being subject by the terms of the law to any exception, or limitation, or restriction, lasts so long as the cause exists, so long as she continues to be a married woman, so long as she remains, in legal contemplation, under the bonds of matrimony, from which nothing but death or divorce can release her.

This rule is laid down clearly in the Roman law—Dig. lib. 50, tit. 1, l. 38, sec. 3—from which it found its way into the systems of continental Europe and into our Code: "*Imperatores Antoninus et Verus reserpesent mulierem, quamdium nupta est, incolam ejusdem civitatis videri, cujus maritus ejus est*."

Mrs. Blake resides in Louisiana, but that is a mere fact to which the law does not attribute domicile as a consequence. She has no domicile in Louisiana, because her husband has none, he having forfeited that which he once had by prolonged absence. While she continues to be a married woman the law deals with her as being *sub potestate mariti* and subjects her to the disabilities and incapacities of her legal status and condition, though she be a wife only in name and in legal contemplation, and may not have seen her husband for years. It would be strange, indeed, if her incapacity to contract should still continue, so that she must be empowered judicially, while she has become *sui juris* with respect to domicile, in spite of the law of public order, the law of public policy, which requires her to live with her husband, and which declares

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that she has no other domicile than his. It is true under the French law, true under our law, as it was under the Roman law, *quam diu nupta est*, her husband's domicile is hers, and she can have no other, reside where she may.

Mrs. Blake could not apply to the judge of her husband's domicile for authorization, because he had none in the State; nor could she make the application to the judge of her domicile, for she had none in the State. The law does not say that the power delegated to the judge by article 132 must be exercised by any special or designated judge, and judicial tribunals can not interpolate words which the Legislature has not chosen to use, nor restrict the power to a judge in no way indicated by the law itself.

The power thus vested in the judge is a very delicate one, and it is discretionary. The law does not say he *shall*, it says he *may*, authorize the wife. He should be very careful to see in every case that this power is not abused, that it is not imposed upon; to ascertain the existence of the facts which authorize him to interpose, and to grant the authorization only when he is satisfied that it is necessary for the interest of the wife. We think the power was properly invoked and exercised in this case. Mrs. Blake was in New Orleans, where her creditors resided. After much delay a settlement had been agreed upon which was highly advantageous to her, and there was no occasion for her to go out of the city of New Orleans in order to obtain judicial authorization to pass a contract before a notary in New Orleans to carry that settlement into effect. She was not about to contract any new obligation, but to discharge existing obligations which she had contracted years before, with the authorization of her husband and with proper judicial sanction, and by this means to save from the wreck of her fortune, for herself and her daughters, two of them widows, two of them not married, a home freed from the incumbrance imposed upon her entire property by these obligations.

As to the alleged lesion. If this cause of nullity ever existed, it was barred by the prescription of four years (R. C. C. 1876); but we think it never had any foundation in fact. The testimony shows that Mrs. Blake reserved to herself the most valuable portion of the Ditchley plantation, and that the remainder was well sold for ten thousand dollars cash. But she had nothing to do with this remainder, nor does it concern her whether it was sacrificed or sold for its full value. In consideration of her giving this remainder in payment to her creditors, she was discharged from the debts for which she was bound personally, and for which her property was mortgaged, amounting in capital and interest to over forty thousand dollars, a sum beyond the value of the whole; and two months after this had been accomplished she made a donation to

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her daughters of the property thus released and saved, which she could not otherwise have done.

It would not be just to allow Mrs. Blake to recover the property without requiring her to return to Mrs. Harvey the ten thousand dollars for which it was sold, and which was applied to the liquidation of her debts. It is true fifteen hundred dollars was retained for attorneys' fees, but this was prejudicial to Mrs. Blake's creditors alone, not to her in any sense. She had the full benefit of the price, in the discharge of her debts, which exceeded it fourfold, and if her creditors had permitted Hynes to retain the whole it would have been their affair, not hers.

Equity would also require that the mortgages and debts acquitted and discharged in consideration of the act of fifteenth January, 1867, should be restored to the condition in which they were on that day, before that contract could be avoided and annulled or otherwise disturbed. By the donation to her children of nineteenth March, 1867, Mrs. Blake has made this *restitutio in integrum* impossible.

We conclude that Mrs. Blake was sufficiently authorized to make the contract of fifteenth January, 1867; that there was ample consideration for that contract; that if she could otherwise maintain this action she must first return or offer to return the ten thousand dollars paid by Harvey; that by her voluntary donation to her daughters of the property freed from incumbrance by that contract, she deliberately ratified and confirmed it, as far as the judicial authorization to make that donation could capacitate her for such a recognition and confirmation; and that she has interposed an effectual barrier, an estoppel, against the relief which she claims, to which we think she is not entitled on any of the grounds alleged in her petition.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed; and that there be judgment in favor of defendants against the plaintiff, rejecting the demand of plaintiff, with costs in both courts.

Mr. Justice SPENCER, having recused himself, takes no part in this decision.

DISSENTING OPINIONS.

EGAN, J. I can not give my assent to the view expressed in the opinion of the court that a married woman whose husband has once had a domicile in the State, but has abandoned her and left the State, may be authorized to act by any judge of any parish or jurisdiction in the State. The provisions of the law giving power to the judge having jurisdiction of a cause to authorize a married woman to become a party to prosecute

or defend and stand in judgment are express, and, *ex necessitate*, as incident to jurisdiction of the cause, and have no application or force in the case at bar.

The incapacity of married women is classed with that of insane persons, interdicts, and minors. C. C. 1782. It is removed by the authorization of the husband, or in cases provided by law by that of *the judge*. C. C. 1786. If the husband refuses, the wife may cause him to be cited to appear before *the judge* (i. e., the judge of the domicile), who may authorize her. C. C. 125. If the husband be under interdiction or absent, *the judge* may authorize her. C. C., article 132. She may borrow money or contract debts with the authorization of her husband and of the "judge of the district or parish in which she resides." C. C. 126, 127.

In these articles the definite article is always used to indicate what judge is meant. It is not *any* judge, but *the judge of the domicile or residence*. Such was the view taken in the case of *Fowler vs. Boyd*, 12 La. 70. It is immaterial to inquire whether, under existing laws regulating jurisdiction, the judge is, as held by Judge Martin in that case, "the parish judge." It is the judge of the domicile, whether district or parish judge, who is alone empowered or competent to give the authorization. The analogies of the law are all in favor of this view, and so, also, has been the uniform practice and general interpretation. In other States incapable persons are the wards of the law and of the courts of domicile, and we think are not less so here.

It would be a dangerous practice to permit a married woman to be authorized anywhere and by any judge. So long as the law requires authorization at all, it should be by the judge who knows her and her circumstances and needs, and the motives which prompt her, and those who deal with her. I can not give my assent to the idea that a married woman who once had a domicile in this State loses it for such purposes, and has none by the mere fact of her husband's abandonment or absence. I do not think article 39 of the Civil Code has the effect argued for, or can be held to apply to, a case like the present. The presumption of the law is that the *last* domicile of the husband in the State continues to be that of the wife, unless she is shown to have changed it after his abandonment of her. In this case the fact accords with the legal presumption. The wife continued to reside at the marriage domicile, where she had also separate paraphernal real estate. The provisions of the law making it the duty of the wife to follow the husband wherever he may choose to reside have no relation to a case of this kind, where the husband has left the State, and the mere authority to contract is in question. But while I can not give my assent to the contrary doctrine, and therefore do not believe the authorization given by the district judge in New Orleans in this case good, I do not consider that question

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material to the determination of the case at bar. The plaintiff got the benefit of the price of the land sued for. She has not returned, nor offered to return it, to the purchaser. To enable her to recover without doing so would be to enable her to perpetrate a fraud and an injustice to innocent persons. She can not keep the price and recover the land, whether authorized to alienate it or not. 2 An. 1; 6 An. 56; 10 An. 433.

I therefore concur in the decree.

DEBLANC, J. I concur in the views of Mr. Justice Egan.

No. 6584.

F. AUFEUKOLK VS. P. MONTEGUT ET AL.

The notice of transfer of a judgment against a deceased person, served on the widow, and natural tutrix of the decedent's children, even before she has received her letters of tutorship, is sufficient to perfect the transfer.

APPEAL from the Fourth District Court, parish of Orleans. *Lynch, J.*

McEnery, Ellis & Ellis, for plaintiff and appellee.

Charles Louque, for defendant.

The opinion of the court was delivered by

DEBLANC, J. The defendant became the owner, by purchase, of a judgment of John Lacey vs. Mrs. Marmu, and, issuing execution thereon, seized the judgments which she had obtained against Bonnet and Woods. The seizure of the Bonnet judgment was released. The judgment against Woods had been transferred by Mrs. Marmu to plaintiff, Aufeukolk; she enjoined its sale under the seizure of Montegut.

This controversy hinges on the validity of that transfer. It was made on the tenth of July, 1876, and on the same day the transfer was filed in court, and the judge recognized plaintiff as the subrogated judgment creditor, and ordered notice to be given to Woods, the judgment debtor. The sheriff proceeded to serve this notice on Woods, but he had died that same day. His widow applied for recognition as representative of his estate on the nineteenth of July, and, on the twenty-ninth, signed the inventory as tutrix of the children. The service of the notice of transfer from Mrs. Marmu to plaintiff was made on Mrs. Woods, as widow in community and natural tutrix, on the twenty-second day of August, 1876; on the twenty-third of said month a notice of the seizure of the transferred judgment by Montegut was served on Mrs. Woods, as widow in community, etc.

Mrs. Woods did not receive her letters of tutorship until the thirteenth

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of October, and the defendant contends that no notice on her was good until then. We think otherwise. She was, by nature, the tutrix of her children. The judge does not confer the appointment of such a tutrix. He only confirms the designation made by the law. As tutrix, she sufficiently represented the estate to receive the notice.

The transfer to plaintiff is in no way assailed, and there is no error in the judgment of the lower court.

It is therefore ordered, adjudged, and decreed that said judgment be, and it is hereby affirmed, at appellant's costs.

No. 4975.

JOHN M. CARR VS. LOUISIANA NATIONAL BANK.

A contract of pledge invalid, as to one of its clauses, at the moment of its formation, may be made valid by a subsequent act of the Legislature, enacted for that purpose; and a renewal of the contract, after the passage of such an act, makes it legal.

APPEAL from the Sixth District Court, parish of Orleans. *Saucier, J.*

Alex. T. Steele, for plaintiff and appellant.

Lea, Finney & Miller, for defendant.

The opinion of the court was delivered by

DEBLANC, J. Plaintiff claims from defendant, in cash, \$5543 76, and, in legislative warrants, \$8822 48, for this: On or about the fifteenth of August, 1871, he effected with said defendant a loan of \$14,366 24. That loan is evidenced by a note dated fifteenth of August, 1871, payable one year after date, drawn by plaintiff and indorsed by J. Pinekney Smith. To secure said loan, plaintiff pledged with said bank, as collaterals, \$28,732 48 worth of legislative warrants, issued to pay the per diem and mileage of members during the session of 1871. The note thus given became due on the eighteenth of August, 1872, but was renewed and extended for one year.

Plaintiff alleges that on Friday, the twenty-first of March, 1873, at about two o'clock, p. m., J. H. Oglesby, President of the Louisiana National Bank, and acting for it, met him at the corner of Gravier and Baronne streets, and asked him to sign a paper which he, Oglesby, then held in his hand, the purport of which was an agreement to allow the sale of the pledged warrants at thirty-five cents on the dollar; that it was all they were worth, and that he would credit the amount in extinguishment of plaintiff's note; that, upon the representations and at the urgent request of said Oglesby, he signed said agreement; that at the time he made these representations the said Oglesby had already obtained from the Auditor of Public Accounts a warrant on the State

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Treasurer for \$19,910, in exchange for an equal amount of the pledged warrants; that, to the knowledge of Oglesby, an appropriation of twenty thousand dollars had been made to pay such warrants, which were worth their face value, and that, on his part, it was a fraud and a deception to have induced plaintiff to consent to a sale at thirty-five cents on the dollar.

In its answer, the Louisiana National Bank, after the general issue, sets up the pledge made by plaintiff, admits the receipt of new warrants to the amount of twenty thousand dollars in lieu of those first delivered, and avers the insufficiency of what remains of those collaterals to pay the pledged debt. It also acknowledges that, since the date of its answer, the new warrants were sold for seven thousand one hundred dollars, credited on plaintiff's note.

What are the terms of the pledge referred to? "I, John M. Carr, do hereby consent and agree that, in case my note shall not be punctually paid at maturity, the Louisiana National Bank shall have the right to sell and transfer the warrants so pledged, for cash, at public or private sale, without notice, at the option of said company, and the proceeds of said sale shall be appropriated to the payment of my said note, and all costs and charges attending the sale."

The pledge made on the fifteenth of August, 1871, was renewed by plaintiff on the thirteenth of February, and thirteenth of April, 1872. On the twenty-third of February, 1872, the Legislature adopted an act amending article 3165 of the Civil Code, and "authorizing the sale or other disposition of the property pledged, in such manner as may be agreed upon by the parties, without the intervention of courts of justice, and providing that all pledges then existing shall remain in force and be subject to the provisions of this act."

Admitting the nullity—at its date—of the clause in the act of pledge of 1871 which authorized the private sale, and without notice, of the pledged warrants, was not its renewal on the thirteenth of April, 1872, a new contract, or, if less than that, the revival of a once prohibited and then authorized contract? On this point the argument of plaintiff's counsel is ingenious, but certainly not reasonable, for it is difficult to realize how the nullity pronounced by a repealed law can survive the repeal of that law, to wit: a contract or acknowledgment posterior to that repeal, and destroy the effect of an agreement authorized by a special act of the Legislature, one adopted expressly to legalize and sanction such contracts.

Had the Legislature in 1873 passed an act avoiding the condition to sell without intervention of courts in every contract of pledge entered into after the adoption of the act of 1872 the pledgers could have justly complained that such a provision had impaired and defeated an acquired

right, but plaintiff can not seriously complain of an act which validates his invalid contract, and imparts to its last renewal a validity which, perhaps, it had not at its origin.

The legislative warrants were not exchanged for but converted into Auditor's warrants. Their form was improved, their substance was not altered. They were, after as before that indispensable conversion, the property of Carr, the pledge of the bank, a debt of the State. They were dressed as required by law to gain admittance in the treasury, and in their new form increased in value. Their undressed twins at the date of the trial were still in the coffers of the bank, and, according to the evidence, absolutely worthless.

If, as charged by plaintiff, there really was an exchange of the warrants, was it not like an exchange of copper for gold, and is this not the occasion to apply the rule "that the mandatary is not considered as having exceeded his authority, when he has fulfilled the trust confided to him in a manner more advantageous to the principal than that expressed in his appointment." R. C. C. 3011.

The additional grounds raised by plaintiff are :

First—That the bank was without authority to part with the pledged warrants, except for cash. That is exactly what it did; they were sold for seven thousand one hundred dollars in cash.

Second—That the authority to sell legislative warrants was no authority to sell the Auditor's warrants. This is a distinction in form, not in substance. The bank sold what it held as a pledge, a claim of plaintiff against the State, the identical claim pledged by the latter, then indorsed by the Auditor's warrants.

Third—That defendant has sacrificed said warrants, and is liable for their value. They were sold on the twenty-fifth of April, 1873, for one cent more on the dollar than the lowest price fixed by plaintiff, and, we presume, for one cent less than might have been obtained at that date. On the thirtieth of June, 1873, the bank, through its counsel, allowed J. M. Carr, the plaintiff, a credit of two hundred dollars on a judgment rendered in its favor and against said Carr. That credit covers the difference between the price received from the sale of the warrants and that which Newman said "he was inclined to believe he offered for them." Considering the date of the sale and their value at that date, the warrants were not sacrificed.

Plaintiff contends that there never was but one act of pledge between him and the bank, that of 1871, and that said pledge being the only one in existence in 1872, the law when adopted could not, without impairing the obligation of that contract, authorize the private sale previously prohibited. That said law impaired the rights of John M. Carr on the property he had pledged. If so, all he had to do, instead of renewing

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his contract, instead of authorizing as he did, the sale at thirty-five cents on the dollar, would have been to plead the nullity of the pledge, or rather of one of its clauses, that which he himself had either proposed or accepted. He did the very reverse, and of his own accord, over his own signature, far from repudiating the provision of the act of 1872, which legalized the one illegal clause of his contract, he renewed his obligation and the pledge by which it was secured.

Of what right can plaintiff claim that he has been divested? Is it of the right to disregard an agreement which he sought to withdraw, a consent which he gave to cancel a condition which he fixed, to contest a privilege which he granted? In this instance, he could have been divested but of the right of violating one of the most important conditions of his contract, and that right has been swept away by his own act and the statute of 1872.

There is no error in the judgment appealed from.

It is therefore ordered, adjudged, and decreed that said judgment be and it is hereby affirmed at appellant's costs.

No. 6576.

29	261
46	451
29	261
120	105

THE MAYOR ET AL. OF THE TOWN OF PLAQUEMINE VS. GUSTAVE ROTH.

A municipal corporation can impose no tax on any occupation, unless authorized to do so by its charter.

A PPEAL from the Justice-of-the-Peace Court, parish of Iberville, Marcot, J.

Samuel Matthews, for plaintiffs and appellants.

Barrow & Pope, for defendant.

The opinion of the court was delivered by

EGAN, J. The only question presented for our determination in this case is the power of the plaintiffs to impose and collect a license tax from a person keeping a warehouse and running a dray in the town of Plaquemine.

The charters or acts of incorporation of municipal corporations within the State are the measure as well as the source of their powers.

No general power to tax occupations, trades, and professions is conferred by that of the town of Plaquemine, and neither keeping a warehouse nor running a dray is among the objects of taxation enumerated in the charter; on the contrary, the enumeration of other occupations as objects of taxation would seem to exclude the two the taxing of which is the matter of controversy here. 1 N. S. 126; 3 An. 314.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed, with costs of both courts.

Hart & Hebert vs. Pike, Brother & Co.

No. 6551.

HART & HEBERT, IN LIQUIDATION, VS. PIKE, BROTHER & Co.

In executory proceedings, the notice of judgment, to be served on the defendant previous to the seizure of the property, must be signed and issued by the clerk, and not by the sheriff.

A PPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *Dewing, J.*

S. P. Greves and H. M. Farrot, for plaintiffs and appellants.

Thomas P. Dupree and Herron & Bird, for defendants.

The opinion of the court was delivered by

SPENCER, J. Defendants took out executory process against certain property in the city of Baton Rouge, mortgaged by Hart & Hebert, a few days after the latter had made an assignment of their effects to their creditors.

The plaintiffs, representing the creditors, took out an injunction against the process, and allege many grounds therefor. It is only necessary to notice one of them. They allege, and such is the admitted fact, that the writ of seizure and sale was issued without the clerk's having previously issued the notice of judgment prescribed by articles 735 and 736 of the Code of Practice. That no such notice was ever issued by the clerk, and none ever served on the defendants in the process. It seems that on the day the writ came into the sheriff's hands he gave a written notice to defendants that unless the amount be paid in three days he would seize and sell the mortgaged property.

This notice by the sheriff was not the notice required by law. It clearly results from the provisions of the Code of Practice, articles 735 and 736, that the preliminary notice therein provided for must be issued by the clerk. The writ can not legally issue until that notice has been given, and the sheriff, therefore, can not have the power to give such notice, because he derives his whole knowledge from the writ, which can not legally reach him until this notice is given and the delays expired. The judgment of the court *a qua* dissolving the injunction with three hundred and fifty dollars damages is erroneous. It is therefore ordered, adjudged, and decreed by the court that the judgment appealed from be annulled and avoided, and it is now ordered that the injunction sued out by plaintiffs be sustained and perpetuated, defendants herein paying costs of both courts.

ON APPLICATION FOR REHEARING.

The opinion of the court was delivered by

SPENCER, J. We held in this case that the "notice to the debtor," prescribed by articles 735 and 736 of the Code of Practice, should be issued and signed by the clerk.

We have carefully reconsidered that opinion, and find that we must adhere to it.

The order or decree of the judge making the mortgage executory is so far a judgment that it may be appealed from, and may be enforced by execution *quoad* the mortgaged property. It is a judgment, too, rendered *ex parte*, and without the previous citation of the debtor, and it would be a strange omission in the law if no notice of this judgment was required to be given the debtor before its execution. We find that by article 624, Code of Practice, even when the debtor has been cited and has made default, a judgment confirmed against him in an appealable case can not be executed until notice of judgment has been given him. The Code of Practice in this case does not say by whom this notice shall be issued and served; yet we apprehend that no one will dispute that the clerk of the court is the proper officer to issue it. Why? Simply because being the only legal custodian of the records, he is the only person who can certify what that judgment is. So in the case of executory proceedings, he is the custodian of the record, of the judgment, and, *ex necessitate*, is the proper officer to issue the notice of it. The clerk issues the notice, and the sheriff serves it.

Nor is this doctrine new to the jurisprudence of Louisiana. On the contrary, it plainly flows from both the text and spirit of the Code, and has been held to be the true doctrine by this court in a number of cases. In *Nash vs. Johnson*, 9 R. 12, this court said: "Article 734, Code of Practice, says that when the creditor is in possession of an act importing a confession of judgment he may proceed against the debtor or his heirs without a previous citation, and cause the property to be sold; but in obtaining this order of seizure, says article 735, it shall suffice to give three days notice to the debtor, counting from that on which the notice is given, if he resides on the spot, adding a day for every twenty miles between the place of his residence and that of the judge to whom the petition has been presented. This notice, says this court in 7 Martin, N. S. 514, is the one the sheriff is to give before seizure; but it is not said that it must be a notice signed by the sheriff, but one served or given by him. It has been held in 15 La. 434, that it is not necessary in executory process to serve a copy of the petition on the debtor, but that he must have notice; and it appears to us very proper that such notice should be made out by the clerk, with whom the petition is filed, and that it should be served by the sheriff. To obtain the order of seizure, it is necessary to give notice, says the Code of Practice, that order or writ is issued by the clerk on the mandate or judgment given by the judge, and it is not possible for the sheriff to give notice except by a notice signed by the clerk, he alone having in his possession all the proceedings and the order or decree directing the writ to issue. This notice is something

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like a notice of judgment, and the delay accorded to the debtor before the issuing of the writ is to enable the party to apply to the judge for an appeal or to adopt some other mode of redress in case the proceedings are irregular or unlawful."

These views, so strongly expressed by our predecessors, meet our entire approbation, and give, we think, the true interpretation of our law. We do not share the apprehensions of defendants' counsel, as to the disastrous effects of this doctrine in unsettling titles in districts where a different practice has prevailed.

We have lately held that where the notice was signed and served by the sheriff, he having the writ in his hands at the time, it was not such an irregularity as would vitiate the sale. In the case above quoted (9 R. 12) it is said: "*It is possible* that the notice would be good if signed by the sheriff, after an order or writ of seizure was in his hands; but until he gets such writ he has no authority to act, and can only serve the notice given him by the clerk."

We therefore conclude that the proper mode is for the clerk to issue the notice and the sheriff to serve it; and that its non-observance is good ground of injunction.

The rehearing asked for is refused.

No. 6505.

STATE EX REL. EXCHANGE BANK VS. BOARD OF LIQUIDATORS.

Under the funding act of 1874 the Board of Liquidators provided for by that act are vested with discretionary power to fund, or refuse to fund, any and every indebtedness of the State presented to them for funding; but by the act of 1875, (supplementing that of 1874,) they are prohibited from funding any bonds of the State enumerated in said act, until this court has declared them to be valid. The Board of Liquidators, under said funding acts of 1874 and 1875, having discretionary powers, can not be compelled by a mandamus, to fund any indebtedness of the State.

APPEAL from the Superior District Court, parish of Orleans. *Lynch, J.*

Kennard, Howe & Prentiss, for relator and appellant.

H. R. Steele, Assistant Attorney General, and *T. A. Flanagan*, for defendant.

The opinion of the court was delivered by

MANNING, C. J. The relator holds five bonds of one thousand dollars each, issued by the State to the Baton Rouge, Grosse Tete, and Opelousas railroad in 1855, and purchased by him in 1872, which with their coupons he desires to fund in the consolidated bonds of the State. The exchange is to be made at the rate of sixty cents on the dollar, under the funding act of 1874. To accomplish this he applied to the defendant.

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who refused to fund them, alleging that the act of May 17, 1875, had prohibited it until the Supreme Court of this State had so ordered. Thereupon the relator took this proceeding by mandamus to compel the defendant to exchange his bonds and coupons for the consolidated bonds of the State.

The defendant met the alternative writ with a denial that relator was in a situation which authorized him to require that his bonds be funded, and for this: that the act of 1875 expressly prohibits the defendant from issuing any bonds in exchange for outstanding bonds or warrants of date anterior to January 24, 1874, the legality of which has been or shall hereafter be questioned, until said bonds or warrants shall have been declared by the Supreme Court of this State legal and valid obligations against the State, and that they were issued in strict conformity to law, and not in violation of the State and Federal constitutions, and for a valid consideration. Acts 1875, p. 110.

The same act proceeds to declare "questioned and doubtful as to their legality and validity" certain enumerated bonds, among which are thirty thousand dollars of bonds of the kind held by the relator, and the Board of Liquidation is prohibited from issuing bonds, authorized by the funding act, in exchange for the bonds thus enumerated until their legality, validity, and consideration have been tested under the provisions of the act and a final decree rendered thereon. The relator must therefore obtain from this tribunal a final decree establishing the legality and validity of his bonds before he can properly demand of the defendant that they be funded, and until he has obtained such decree he is not entitled to the writ of mandamus to compel the defendant to do that which it is not his duty to do before a final decree of this court is exhibited to him declaring such funding to be his duty.

The answer of the defendant also denies that relator's bonds form any portion of the floating debt, or of the valid outstanding bonds, within the meaning of the supplemental funding act, and alleged that they did not pass from the possession of the State lawfully, and that the State did not receive any valid consideration for them.

It is manifest that the issue thus tendered is of higher dignity than a mere question of practice. It strikes at the root of the power of the Board of Liquidation to fund certain enumerated bonds, or classes of bonds, and the whole scope of that power, its original range and extent, and its subsequent limitation, come necessarily under review in order to determine the rights of relator in the present proceeding.

The funding act (acts 1874, p. 39) was a confession of bankruptcy on the part of the State. It provided for the exchange of all valid outstanding bonds of the State, and all valid warrants drawn previous to its enactment, with certain exceptions, for consolidated bonds at the

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rate of sixty cents in the latter for one dollar of the former. To effect this exchange, a Board of Liquidators was constituted, whose duty was to receive the old bonds and warrants and issue the new bonds, and in case of the rejection of any bond or warrant by this board and its refusal to make the exchange the holder of the bond or warrant thus rejected might apply by petition to the proper court for relief, and if final judgment should be rendered in his favor against the board, then it shall be its duty to fund the bond or warrant thus offered.

The supplemental act, enacted the following year, separated certain bonds from the general mass of the State obligations, and put them under suspicion. It enumerated them, in aggregate over fourteen millions, and declared their legality and validity questionable, and prohibited the Board of Liquidation from exchanging them until their validity shall be tested in the manner pointed out by the act, and prescribed that the sole convincing and determinative test should be a final decree of this tribunal declaring them to be legal and valid obligations of the State, and that they were issued in strict conformity to law, and not in violation of the constitution of this State or of the United States, and for a valid consideration.

In order to enlarge this facility for testing the validity of any bond enumerated in the proscribed list, permission was given to any person assessed for State taxes to institute suit in his own name, or to intervene in any suit instituted by another, against the Board of Liquidation and prosecute it to a final termination; and any holder of bonds or warrants whose validity is questioned in any suit brought under the provisions of this act may intervene in such suit, the final termination of all of them being a decree rendered by the Supreme Court, without which the bond or warrant thus questioned could not be funded.

Thus it is apparent that the board was not compelled to exchange any bond or warrant that might be presented under the act of 1874 for a consolidated bond without question. That it had a discretion is obvious from the provision made for the holder in case his bond was rejected; *i. e.*, he may apply by petition to a proper court for relief, and if final judgment is rendered in his favor, it shall be the duty of the board to fund his claim.

But the act of 1875 deprived the board of this discretion *quoad* the bonds enumerated in it. So far from imposing upon its members the duty of inquiry touching the validity, or legality, or consideration of these bonds, the act commanded them to assume that they were invalid, illegal, and of no consideration, and prohibited them from deciding the question--prohibited them from exchanging the bonds until another designated tribunal had decided it for them.

Under the act of 1874, it is the duty of the board to fund the general

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indebtedness of the State, with discretionary power to reject such claims as did not seem proper, and with the right to the holder to test the merits of the rejection before a competent court. Under the act of 1875, it is the duty of the board to reject the bonds enumerated in it, and the holder of them must himself lift the cloud which that debt declares rests upon them, and vindicate their validity, legality, and good consideration by obtaining a decree from the court of the last resort in his favor. That which was the duty of the board to do under the first act is its imperative duty not to do under the second.

A mandamus is an order issued in the name of the State, addressed to an individual, or corporation, or court of inferior jurisdiction, directing the performance of some act belonging to the place, duty, or quality with which it is clothed. Its object is to prevent a denial of justice, and it should therefore be issued in all cases where the law has assigned no relief by the ordinary means, and even when a party has other means of relief, if the slowness of ordinary legal forms is likely to produce such delay that the public good and the administration of justice will suffer from it. Code of Practice, arts. 829 *et seq.* Our courts have more extensive power under the Code of Practice in issuing the writ than have those of common-law jurisdiction, but it never issues to compel public officers to do an act in which they have discretionary power. *College vs. Treasurer*, 2 La. 395. One of its important and distinctive features is, that it is used merely to compel and coerce the performance of a pre-existing duty. Wherever there is a clear and specific legal right to be enforced, or a duty which ought to be performed, and there is no other specific and adequate legal remedy, the writ will issue. It is not granted in doubtful cases. To warrant the relief, the relator must have a clear and legal right to the performance of a particular act or the fulfillment of a particular duty at the hands of the respondent, and this right must be a complete and not merely an inchoate right. *High's Extraordinary Legal Remedies*, sections 7, 9, 10.

To justify the issuance of the writ in this case, the relator must have a present and perfect right to have the bonds presented by him funded, and it must be the respondent's duty to fund them, a duty the performance of which is not discretionary on the one hand—a right which is not inchoate and imperfect on the other.

Another prerequisite is that the respondent shall have refused to do that which was his duty to do. It is not sufficient that the relator has a specific legal right to be enforced, but its enforcement must have been obstructed and prevented by the refusal of the respondent. It is not sufficient that the relator may have a legal duty to perform, but that duty must pre-exist, and his refusal to perform it is the basis of the writ, and must be an antecedent fact or act which alone justifies its issuance.

The relator's bonds were among those enumerated in the act of 1875 as "questioned." The law denounced them as *suspect*, and imposed upon the board the duty of refusing to fund them. It was not only not its duty to fund them, but its duty was not to fund them. Its only warrant for funding them was the sanction of their validity and legality, attested by a final decree of this court. Until that was imparted to them, there was no dereliction of duty by the board in its refusal to fund the bonds, and nothing but its refusal to do its duty can furnish the legal occasion for the command to do it.

It is objected that this ruling will compel circuity of action, and will foster multiplicity of suits, which the law abhors, for if the holder of bonds is driven to his suit against the board to test their validity, and can not halt until he has obtained a final decree of this court, he must at last invoke the writ of mandamus to compel the board to fund, and, again, that the validity of the bonds can as well be inquired into and established by the writ of mandamus as by the direct action. But it is not to be assumed that the board will refuse to do its duty when the bondholder presents that which alone can authorize it to act, viz.: the decree of the Supreme Court. And it must be assumed that the board will refuse so long as it is its duty to refuse. The writ of mandamus is not fitted to ascertain the validity of bonds that are made doubtful, not by a presumption of law merely, but by an express statutory declaration. Its essence is the enforcement of a right already ascertained, not the ascertainment of a possible right already declared doubtful.

The intent of the supplemental funding act will be the more apparent if we consider the nature and effect of the judgment we are now asked to render. It is to make the mandamus peremptory, that is, to say to the lower court, there was error in your not ordering the respondent to fund the relator's bonds, although that respondent was never obliged to fund them until this decree is exhibited to him. The essential prerequisite to the respondent's funding them is the decree now rendered upon his refusal to fund them. Not until the final decree of this court pronounces the validity of the bonds is his refusal a dereliction of duty, but we are asked to declare their validity, and in the same breath to reverse the judgment of the lower court as being wrong, when the only thing that could justify it in rendering a different judgment would be the exhibition of our decree, now for the first time rendered. That decree is one of the ingredients, an essential ingredient, of the relator's cause of action, but it is not supplied until the action terminates. It should have been a germ that developed into life, and gave vitality to a right until then only in embryo. By this construction, the decree terminates the existence of the action, though without it the action could not have lived.

The final decree of this court was a necessary preliminary to the

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relator's demand of the board to fund his bonds. The refusal to obey that decree was a necessary preliminary to the issuance of the mandamus to the respondent. The case lacks both, and therefore

It is ordered, adjudged, and decreed that the judgment of the lower court refusing the mandamus is affirmed with costs.

CONCURRING OPINION.

SPENCER, J. In the case of Durant vs. the Board of Liquidation the defense put at issue the validity, consideration, legality, and constitutionality of the bonds, without objection as to the proceeding by mandamus being premature. We then held that this objection, made in the briefs of counsel only, came too late, and intimated that such a cumulation of the merits with proceedings for mandamus at least avoided multiplicity and circuitry of action and diminished costs. In the case now before us, the objection to the form of proceeding is specially made *in limine*. An attentive examination of the funding bill and supplementary acts constrains me to the conclusion that the objection must prevail, however illogical I may think the law to be.

I therefore concur in the opinion delivered by the Chief Justice.

DISSENTING OPINION.

DEBLANC, J. Plaintiff is the holder of several bonds made and delivered by the State of Louisiana to the order of the Baton Rouge, Grosse Tete, and Opelousas Railroad Company, and bought, it is alleged, before maturity and at their market value.

Defendant refuses to fund said bonds, on the grounds :

First—That the suspicion which rests on their validity has not been removed by a decree of this court.

Second—That the board is expressly prohibited, before such a decree, from funding any of the bonds belonging to the suspected class.

Third—That said bonds were not lawfully issued, did not lawfully pass from the possession of the State, and they are not, within the meaning of our constitution and statutes, any portion of the floating debt of Louisiana.

Thus, without exception, every issue which can now or hereafter be raised, by either plaintiff or defendant, in regard to the funding of those bonds, is raised in and by their pleadings. Their validity and the title of the holder are asserted by plaintiff, denied by defendant. The action could be reduced, the defense can not be increased.

Plaintiff's petition contains two distinct demands, one that the board show cause why it should not fund, as required; the other that by mandamus we command the funding. The last of its demands is premature,

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the other is not. If both can not now be urged, the first can, and that which is irrelevant does not vitiate that which is relevant.

If plaintiff again appears before our courts, what shall it ask? Less the mandamus, which at this very moment it is asking, a decree—to enforce which an additional decree may become indispensable—one recognizing the right, the other ordering the execution of the first. Why, then, not decide at once whether the bonds are fundable, whether that branch of the action should be granted or denied?

I respectfully dissent from the opinion of the court.

No. 6537.

JACOB STRAUSS VS. M. SOYE ET AL.

The *procès verbal* of a sheriff, containing all necessary recitals, signed by the sheriff, and the purchaser of the property sold at public sale by the sheriff, and attested by two witnesses, has the legal value of a formal sheriff's deed.

A PPEAL from the Fifth District Court, parish of Orleans. *Cullom*, J.

Hornor & Benedict, for plaintiff and appellee.

Charles F. Claiborne, for defendant.

The opinion of the court was delivered by

MANNING, C. J. The plaintiff enjoined the sale of lot No. 380 on Canal street in this city, which was about to take place under an execution issued upon a judgment against Mrs. Cormier, of which the defendant was the owner by subrogation. The allegation is that Mrs. Cormier is not the owner of the property seized, but that plaintiff owns it by virtue of a purchase at sheriff's sale on the thirteenth of December, 1875, which has been duly recorded.

The answer is as follows: "Now comes into court Martin Soye, made defendant herein, and for answer to the petition herein requires strict proof of the facts and allegations therein, and prays that plaintiff's demand be rejected at his cost."

The plaintiff offered in evidence the *procès verbal* of the sheriff's sale, and the certificate of its registry in the conveyance office. The defendant objected to the introduction in evidence of the *procès verbal*, on the ground that it was not a complete sheriff's deed, and upon the court overruling the objection reserved his bill to the admission of the evidence.

The ruling of the court was correct; the objection went to the sufficiency and effect of the evidence, and not to its admissibility.

No evidence was offered by the defendant, and he relies on a supposed

Strauss vs. Soye.

incompleteness of the sheriff's conveyance to plaintiff, alleging that there must be a deed from the sheriff supplemental to the *procès verbal*.

The *procès verbal* of the sheriff in evidence fulfills all the requirements of the Code of Practice (articles 692, 693), and is of itself a deed. It contains all the necessary recitals, and is signed by the sheriff and the purchaser, whose signatures are attested by two witnesses.

The judgment was for the plaintiff, and for these reasons —

The judgment of the lower court is affirmed with costs.

No. 6414.

L. C. ROUDANEZ ET AL. VS. THE MAYOR AND ADMINISTRATORS OF THE CITY OF NEW ORLEANS. NEW ORLEANS AND PACIFIC RAILROAD COMPANY, INTERVENORS.

29	271
50	183
29	271
123	448
123	450

An injunction will not issue, at the instance of the taxpayers of a municipal corporation, to prevent the officers of that corporation from holding an election, under the authority of a legislative act, to enable the citizens of the corporation to vote to levy, or not levy, a certain tax on themselves. The action is premature. No right of the plaintiffs is, as yet, invaded, and the danger they seek to shun is too remote, and contingent, to warrant the issuance of an injunction.

A PPEAL from the Superior District Court, parish of Orleans. *Lynch, J.*

B. R. Forman, J. B. Eustis, and H. N. Ogden, for plaintiffs and appellants.

Kennard, Howe & Prentiss, for intervenors.

Samuel P. Blanc, Assistant City Attorney, for defendants.

The opinion of the court was delivered by

SPENCER, J. The plaintiffs, Roudanez and forty-two other citizens and property holders of New Orleans, bring this suit. They allege in substance that each and every one of them owns real and personal property in said city liable to taxation. That the General Assembly, by act No. 20 of 1876, authorized and required the Mayor and Administrators of New Orleans to hold a popular election, to decide whether or not a tax of one-half of one per cent on all taxable property in New Orleans should be collected annually for four years, for the use and benefit of the said Pacific Railroad Company. That said act and the tax proposed therein are violative of the fifth and fourteenth amendments of the constitution of the United States, and of various articles of the constitution of Louisiana. That the Mayor and Administrators are about to execute or attempt to execute its provisions against your petitioners and other inhabitants of New Orleans, to their great wrong and injury, etc.

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Wherefore, they pray for an injunction restraining said officials from in any manner attempting to carry into effect the said act No. 20.

The injunction was granted.

The Pacific Railroad Company intervened, and moved to dissolve the injunction on the face of the papers, and as being prematurely and improvidently sued out.

The court below sustained this motion, dissolved the injunction, and plaintiffs prosecute this appeal.

The case has been ably and exhaustively argued before us, both as to the question of prematurity and as to its merits. But as these are matters of fact alleged in the petition, which for the purposes of the motion only are taken as true, we do not see how we can do more than pass upon the motion and the ruling of the court thereon. If we sustain it, that ends the case. If we overrule it, the case will have to be remanded to be tried on the questions of law and fact involved.

The question therefore presented for our decision is, can the plaintiffs, citizens and taxpayers of New Orleans, alleging that the defendants, the Mayor and Administrators of the city, are about to hold an election to decide upon the levying of a tax under act 20 of 1876, and that that act is unconstitutional, and that any tax levied by virtue thereof will be illegal and void, restrain and enjoin them from so proceeding?

It is not pretended that any tax has been levied or is demanded of the plaintiffs. Nor is it even asserted that such tax will be levied, but only that it may be the result of the proposed election.

We think that the danger apprehended is too remote and too contingent to form the basis of a proceeding in court to avert it.

Courts of justice have enough to do in dealing with real, existing, and present wrongs, without anticipating and combating hypothetical evils of the future that may or may not arise. It will be time enough for the plaintiffs to complain when their rights are actually invaded, or when danger to their persons or property is imminent and impending. There are too many contingencies at present between them and danger to justify them in resorting to law. Act No. 20 may yet be repealed, or the tax proposed may be voted down, or plaintiffs may cease to be taxpayers, or the railroad corporation may cease to exist, or forfeit its charter.

It seems to us that the plaintiffs have set up, and now ask us to protect them against, a mere possible adversary, which at present is without substance or power to harm them.

Even if it be conceded that the levy of the tax contemplated by said act would be unconstitutional (upon which we of course express no opinion), we do not see that that fact would render *the holding of the election* unconstitutional. If the tax would be unconstitutional, it is fair

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to presume that a law-abiding people would vote it down. We know no provision of the constitution which forbids the Legislature from ordering an election to take the sense of the people upon any question which it may deem important. If private individuals were thus allowed to interfere with and embarrass the government, its most ordinary functions could be completely stopped by persons claiming to champion and protect the rights of the public. Thus, if the Legislature should in its wisdom direct that a vote of the people be taken upon a proposed constitutional amendment, or upon the calling of a State convention, or upon any other matter, one or more individuals, alleging that the expenses of such election would increase the State debt, or necessitate a State tax beyond the constitutional limits, could enjoin the holding of such election, and in fact paralyze the government in its every step. While this court will always be found to favor the largest liberty of the citizen asserting his individual rights, and ready at all times to lend its aid for his protection, we can not give our sanction to a doctrine which we think destructive of all government, and which would fill our courts with litigations based upon mere theories and hypotheses, and not upon actual grievances.

If the city of New Orleans should, by vote or otherwise, seek to extort from the plaintiffs illegal or unconstitutional taxes, whether to pay for election or other purposes, they will have ample opportunity to protect themselves through the courts. But "sufficient unto the day is the evil thereof."

We can not better express and conclude our views upon this subject than by quoting the language of that eminent jurist, Mr. Justice Cooley, in *Miller vs. Grandy*, 13 Michigan, 548.

"An individual has no right as a taxpayer, either in his own name or on behalf of himself and the other taxpayers, to file a bill to enjoin proceedings in advance of the actual levy of a tax. He can not seek redress until his own tax can be ascertained, and he can not then proceed in equity, except to protect his individual interest from injuries not remedial otherwise. * * * * *

"Without undertaking to go into any elaborate discussion of all the questions which might arise, we feel confident that no case can be found which recognizes any propriety in enjoining the *preliminary proceedings in advance of the actual levy of a tax* on either personalty or realty. Apart from the palpable difficulty of determining in advance *whether the complainant will be in a condition to be injured when the tax is assessed*, it is always to be remembered that, under our system, taxes must be provided for at regular times, and by annual and somewhat rapid proceedings. * * * * *

"No court could ever be justified in such an interference with the

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necessary course of government. After a tax has been assessed and becomes collectible, each man's share becomes severable from the rest, and delaying its payment will not necessarily operate upon his neighbors. These principles are familiar, and rest on good sense and sound policy."

It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed, with costs of both courts.

No. 6604.

JOHN BOUBEDE VS. JOHN O. AYMES. EXECUTORS OF McNEIL, THIRD OP-
PONENTS.

A party who judicially demands to be paid the proceeds of a sale, admits thereby the legality of that sale, and is estopped from impeaching it.

A third opposition is only permitted when the opponent is the owner of, or has a privilege on, the thing seized.

APPEAL from the Sixth District Court, parish of Orleans. *Sawier, J.*

Hornor & Benedict and *F. W. Baker*, for third opponents.

F. D. Seghers and *C. E. Schmidt*, for plaintiff and appellee.

The opinion of the court was delivered by

SPENCER, J. The material facts alleged by the third opponent, McNeil, are: That he held a mortgage note of Tabary for eleven hundred dollars; that he had foreclosed, *via executiva*, and realized by the sale only one hundred and thirty-five dollars of the debt; that pending these proceedings Tabary sold a certain other piece of property to his son-in-law, Aymes, and took notes secured by mortgage for the price; that McNeil proceeded *via ordinaria* and obtained judgment against Tabary for the balance due him, which judgment was, *after the sale* from Tabary to Aymes, recorded as a judicial mortgage. After getting this judgment McNeil instituted suit *en declaration de simulation* against Tabary and Aymes, to avoid the sale between them. Pending this action to annul, Boubede, as holder of the notes given by Aymes to Tabary, took executory process, and sold the mortgaged property to Mathé for fifteen hundred dollars, part cash and part on terms, to meet unmatured note. McNeil's executors intervened by third opposition, alleging the above state of facts, and reiterating the simulation of the original sale from Tabary to Aymes, and charging that the judicial sale, at the suit of Boubede vs. Aymes, was a fraudulent simulation to screen Tabary's property from his creditors, and averring that Tabary was in truth himself the owner of the notes proceeded upon by Boubede, who was the mere *alter ego* of Tabary. They pray that the sheriff be ordered to retain the proceeds of the sale

Boubede vs. Aymes.

in his hands, and that McNeil be paid by preference over all others out of said proceeds the amount of his said judgment and judicial mortgage. The sheriff was ordered to hold the proceeds. The executors also took rule on Mathé, the purchaser, to compel him to pay over *in cash* to the sheriff the whole amount of his bid. Mathé in turn took a rule on the sheriff to compel him to make him a deed on the terms of the sale and adjudication. The opposition and the two rules were tried together. Boubede filed to the third opposition an exception that it disclosed no cause for intervening or for the relief asked.

The court sustained this exception, dismissed the opposition and rule of the executors of McNeil, and made absolute the rule of Mathé on the sheriff. The executors of McNeil appeal.

We think there was no error in this decree of the court below. By intervening and claiming to be paid by preference out of the proceeds of the judicial sale in Boubede vs. Aymes, the opponents certainly ratified and admitted the legality of that sale. See 3 An. 454; 22 An. 135; 23 An. 245.

As a further consequence, if it be admitted that the judicial sale in Boubede vs. Aymes was legal and valid, then the sale from Tabary to Aymes was also legal and valid, for this judicial sale was predicated upon notes given by Aymes to Tabary for the price. It does not lie in the mouth of McNeil to say that the sale from Tabary to Aymes was void when he is claiming the price of that sale, realized under execution sale in Boubede vs. Aymes. He is estopped from denying the reality and existence of either, and therefore shows no cause of privilege or preference on the proceeds, since his judicial mortgage never attached to the property.

But the opponents allege that in truth and fact Tabary was and is the owner of the notes sued upon by Boubede, and counsel ask with great earnestness in their brief if we "are prepared to say that Tabary can take out of the hands of the sheriff his money, while a judgment creditor, with an execution, stands by claiming it? That money, proved to be Tabary's, can not be seized in the hands of the sheriff, simply because a third person, proved to have no interest, claims it." We certainly would not undertake to maintain the affirmative of these questions. But, unfortunately, the opponents are not, in this case, in the attitude of "a creditor with an execution," or of one who has "seized in the hands of the sheriff" the funds of Tabary. If opponents had seized the funds, and were seeking to hold them, under the allegations that they belonged to their judgment debtor, Tabary, and that the pretended ownership thereof by Boubede was a fraud and simulation, the case would present a very different aspect. But they have not seized them. They have simply filed a third opposition. Now, this court well said in *Livaudais*

Boubede vs. Aymes.

vs. Livaudais, 3 An. 454, that "a third opposition is allowed but in two cases; first, when the third opponent is the owner of the thing seized; second, where he has a privilege on it." C. P., arts. 397, 401. In the case at bar the opponents do not and can not pretend to be *owners* of the fund in the sheriff's hands, and we have seen that their judicial mortgage, recorded against Tabary after the sale by the latter to Aymes, did not attach to the property so sold, and the proceeds of which are in question in this suit. We see no other ground for claim of preference.

We see no error in the decision of the court below on the rules taken by opponents and Mathé.

It is therefore ordered, adjudged, and decreed that the judgments appealed from be affirmed, with costs in both courts.

DISSENTING OPINION.

DEBLANC, J. In this case, to a third opposition filed by the executors of Alex. McNeil plaintiff opposes the exception that their pleadings disclose no cause of action. For the purposes of the trial of that exception the averments of opponents must be taken as true. What are they? Tabary is a debtor to the succession of McNeil; that succession has obtained a judgment against him; that judgment has been recorded; by that recordation that succession has acquired a judicial mortgage on Tabary's property.

Had he any property at the time the McNeil judgment was obtained and the McNeil mortgage acquired? He had. The property affected by that mortgage was, it is alleged, apparently transferred by Tabary to Aymes, and a note from Aymes to Tabary, representing the purchase price of that simulation, apparently transferred to Boubede, the chosen agent of Tabary. Though he held that note for Tabary, Boubede has caused Tabary's property to be seized and sold to satisfy a note belonging to Tabary. At that sale, Mathé, an innocent party, purchased that which, up to that date, had not ceased to be Tabary's property, and was then opposed by the McNeil mortgage.

Do the opponents claim the nullity of that sale and its proceeds? They do not. The sale from the sheriff to Mathé has alone divested Tabary's title to that property, and, by that sale, the only one recognized and ratified by opponents, the McNeil rights have been transferred from the property to the proceeds of the ratified sale, and, under the pleadings, the McNeil succession is entitled to these proceeds. Otherwise, they shall pass from the sheriff to Boubede, from Boubede to Tabary.

I do not think that the ratification of the sale from the sheriff to Mathé ratifies the sale from Tabary to Aymes and the transfer to Boubede.

Boubede vs. Aymes.

The sale to Mathé is a real contract; the other never had any legal existence. It was not the simulated note and the simulated mortgage enforced by Boubede which imparted to the sheriff's sale its undisputed validity; it was the owner's consent and the creditor's ratification. Tabary's mortgaged property has been sold by Tabary's agent, by his consent, under his instructions, and his creditor, the mortgagee, claims by preference the proceeds of that sale, and on opposition to whom? Tabary, his debtor.

It may be that there has been no fraud, no simulation, on the part of either Tabary, Aymes, or Boubede, but it is charged there was, and, though the charges may be unfounded, though, if investigated, they could not be verified, they stand admitted by the exception and during its trial. Taken collectively, they do disclose a cause of action, and, perhaps, the most appropriate action that could have been resorted to under the circumstances, to defeat the nearly realized effects of the alleged simulation.

For these reasons, and believing, as I do, that the judgment of the lower court should be reversed, and the exception dismissed, I respectfully dissent from the opinion read by Mr. Justice Spencer.

No. 6566.

29 277
46 540

SAMUEL F. TICKNOR VS. M. M. A. CALHOUN.

The contents of a lost instrument creating obligations can not be shown by parol, until the loss itself has been proved and properly advertised.

Where an absentee, represented by a curator *ad hoc*, who has not been able to communicate with his client, is sued on an instrument alleged to be signed by him, the plaintiff must prove the absentee's signature as strictly as though the signature had been denied.

APPPEAL from the Ninth Judicial District Court, parish of Rapides.
Orstorn, J. Trial by jury.

R. J. Bowman, for plaintiff and appellant.

A. Carahan, for defendant.

The opinion of the court was delivered by

EGAN, J. This is an attachment suit against the defendant, a non-resident, based upon an alleged written obligation given in consideration of a stay of execution for twelve months upon a judgment of plaintiff vs. W. S. Calhoun, obtained in the district court of Grant parish, and to secure its payment. The defendant was represented by an attorney *ad hoc*, who waged a vigorous and successful defense.

We deem it unnecessary to notice the exceptions to the action and to the attachment, and also most of the bills of exception with which the record abounds.

Ticknor vs. Miss Calhoun.

The answer was a general and special denial, and sets up that the plaintiff must sue Miss Calhoun and obtain judgment before attaching. The force or propriety of this last position we are unable to perceive. The papers and judgment in the case of Pratt & Ticknor vs. W. S. Calhoun, to secure which it is alleged defendant bound herself, were destroyed by the burning of the court-house in Grant parish. An act was passed in 1875 authorizing and prescribing the mode of reviving the burned records. It does not appear that plaintiff availed himself of its provisions; but we do not regard that as furnishing the exclusive means of evidence of the destroyed documents. The existence, character, date, and amount of the judgment vs. W. S. Calhoun are set forth in the written agreement of suretyship found in the record, and while the production of other evidence of the condition of the record at the time of its destruction would have been safer and more satisfactory, we are not prepared to pronounce it absolutely necessary. The attorney *ad hoc* applied for a continuance, which should have been granted.

The case was tried by a jury, which returned "a verdict for defendant, as in case of nonsuit, the plaintiff having failed to prove the signature of Miss Calhoun." Upon this an absolute judgment of dismissal was erroneously entered in the court below. The only evidence of transfer of the judgment of Pratt & Ticknor vs. W. S. Calhoun, or of debts due said firm to the plaintiff, is that of Robert A. Hunter, who says, "he received letters to that effect from both members of the firm, which are now mislaid or lost, and can not be found after diligent search."

We think the exception to the reception of parol evidence of transfer should have been sustained. The evidence was essential to recovery. The testimony of the witness himself disclosed the existence of better and written evidence, which no sufficient effort had been made to recover and no proper foundation laid to supply. *Lockhart vs. Jones*, 9 R. 381. In this case there is no affidavit of plaintiff and no advertisement of loss, and the testimony of his former counsel that he had made diligent search for the letters without success was not sufficient. See same case, 9 R.; 3 An. 228; C. C. 2279, 2280.

The evidence of plaintiff is loose and unsatisfactory. He seeks to recover from the defendant the debt of another, evidenced by judgment alleged to be destroyed, and of which no other evidence is given than the acknowledgment in the instrument of suretyship sued on, the authenticity of which is denied. The compliance with the condition of the obligation is not shown in the manner provided in it; *i. e.*, by the written statement of W. S. Calhoun on the instrument of suretyship that the stay of execution had been allowed him. There is neither allegation nor evidence as to whether the judgment had or had not been satisfied by the judgment debtor or by sale of his property. The defendant was

Ticknor vs. Miss Calhoun.

a non-resident, whose appointed counsel made affidavit for time to communicate with his client and of a probable substantial defense if allowed opportunity to urge it. Both were denied him, and he was forced into an early trial. There was no evidence of the execution of the instrument sued on by any witness who had seen the defendant sign it; none by any witness who had ever seen her write or sign her name; none by comparison of proved or admittedly genuine signatures. One witness swears to having received one letter from Miss Calhoun, whom he had never seen and never seen write. The letter was not present on the trial, and the witness had not seen it for three years, but said the signatures to the letter and the instrument sued on were the same. Another witness swore that he never saw the defendant sign her name, but had received letters from her, and believed the signature to the document sued on to be hers. The letters were not present, were not exhibited to the court or jury, nor is their date given. Another witness swore that he believed, but was not positive, that the signature was Miss Calhoun's; could not say he ever saw her write her name; had often seen the writing of the defendant; could not say whether he ever saw Miss Calhoun's signature, except on correspondence between her and her brother; didn't recollect whether the brother had shown him more than one letter, and winds up by saying that the signature upon those letters "was said by her brother to be that of defendant; he also saw her signature officially," but does not disclose how, when, or where; and neither the letters nor the signature "seen officially," though he had just admitted he never saw her write, were produced for comparison. The whole evidence of this witness shows that he testified from hearsay.

We think the plaintiff should have been held to the same strictness of proof against an absent defendant, represented only by an attorney *ad hoc*, as though the signature were specially denied by a defendant present or by his heirs or other representatives. C. C. 2245; C. P. 325; 9 L. 562; 18 An. 419; 21 An. 148, 523. That evidence is only of three kinds:

First—Of witnesses who saw the instrument signed.

Second—Of witnesses who had often seen the party write and sign his name; and

Third—By comparison of handwriting; *i. e.*, by the production and comparison before the court and jury of signatures, proved or admitted, with that sought to be proved, so that the court or jury may themselves be able to compare and judge for themselves.

In 21 An. 148, just cited, one witness said: "I recognize the signatures as being genuine, having paid many drafts bearing the same signatures and never disputed by either party." Another witness said: "I recognize said signatures as being genuine, on the ground that I have often and often seen said signatures." The court held that the evidence was

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insufficient, and that article 325, Code of Practice, is the controlling law.

We agree with the jury in the case at bar that "the plaintiff failed to prove the signature of defendant" by legal or satisfactory evidence, and that he has not made his case certain. As, however, the judgment does not conform to the verdict, which was one of nonsuit, the costs of appeal must be allowed him.

It is therefore ordered, adjudged, and decreed that the judgment of the court below be set aside and avoided, and that plaintiff's suit be dismissed as of nonsuit.

No. 5178.

R. G. LATTING VS. FASSMAN, BRYANT & Co.

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115	1087

Section 5057 of the United States Revised Statutes declaring that suits by, or against an assignee in bankruptcy, touching any property, or rights of property transferable, or vested in such assignee, must be brought within two years from the time when the cause of action accrued for, or against him, only applies to causes of action which *accrue* after the bankruptcy and in which the defendant really sets up an adverse interest to the plaintiff. It does not apply to suits brought by, or against the bankrupt, before his bankruptcy, and to which the assignee merely makes himself a party, in order to carry on the suit.

A partner *in commendam* is entitled to sue for a settlement of the partnership, and ascertain, and demand his share of its assets.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J.*

Randolph, Singleton & Browne, for plaintiff and appellant.

Thomas Gilmore and J. Ad. Rozier, for defendants.

The opinion of the court was delivered by

WYLY, J. Plaintiff brought this suit in March, 1867, for the partition of the partnership existing between plaintiff and defendants for the manufacture of bricks. In February, 1869, R. G. Latting was adjudged a bankrupt and his estate assigned to E. E. Norton, assignee. In June, 1873, more than two years after his appointment, the assignee made himself a party to this suit. Thereupon E. K. Bryant, one of the defendants, excepted, on the ground that under the bankrupt act the assignee was barred by the lapse of two years from instituting this proceeding or becoming a party to this litigation. He also excepted to the litigation by Chambers, the alleged commendam partner of R. G. Latting, on the ground that he was without interest, and could not interfere in this proceeding. The court maintained the exception and dismissed the suit.

E. E. Norton, assignee, and William Chambers, the alleged commendam partner of R. G. Latting, have appealed.

We think the court did not err.

The assignee permitted more than two years to elapse before making himself a party to the proceeding. By section 5057 of the Revised

Latting vs. Fassman, Bryant & Co.

Statutes of the United States the suit could not be maintained by the assignee. Chambers, the alleged commendam partner of Latting, is wholly without interest to interfere in the settlement of the partnership for making bricks which was formed in February, 1862, between R. G. Latting and the firm of Fassman, Bryant & Co. The contract between Latting and Fassman, Bryant & Co. is in the record, and there is no authentic evidence that Chambers was a commendam partner of the partnership for the manufacture of bricks.

The position that before going into bankruptcy R. G. Latting conveyed to Chambers his interest in the partnership the settlement of which is the subject of review can not be maintained. Both before and after the bankruptcy he joined R. G. Latting in filing petitions in which he judicially admitted the interest of Latting and only claimed to be a commendam partner of Latting.

Judgment affirmed.

ON REHEARING.

The opinion of the court was delivered by

DEBLANC. On the first page of the transcript, whose petition do we find? Not that of R. G. Latting, but that of "the commercial house of R. G. Latting, a general partner, and William Chambers, a partner in commendam." In that petition, filed since more than ten years, the two partners aver that in February, 1862, they formed a copartnership with the commercial firm of Fassman, Bryant & Co., and they pray for a settlement of that copartnership.

Of the three defendants, James D. Brown alone denies, and so far only as he is concerned, the existence of that copartnership. He charges that he never authorized or sanctioned the same. It may be that he was and is not a member of that copartnership. As to the others, they were. This fact is established by their judicial admissions; and, besides, by proof adduced on the trial, which stands uncontradicted, and corroborates those admissions.

The answers of defendants were filed in March and April, 1867. In 1868 the matter in litigation was referred to an auditor, and in 1869 the auditor submitted his report. To that report, on the nineteenth of March, 1873, R. G. Latting and William Chambers filed their oppositions. In June, 1873, Bryant excepted to those oppositions on the grounds —

First—That in February, 1869, Latting was adjudged a bankrupt, and on that account could not oppose the auditor's report.

Second—That the supposed causes of action of plaintiff are barred by the statute of limitation.

Third—That Chambers is no party to this suit, and can not be heard in the manner and form attempted.

In June, 1873, Norton, as Latting's assignee, joined in this controversy.

Latting vs. Fassman, Bryant & Co.

The matter in litigation was referred to an auditor before Latting was adjudged a bankrupt, and the auditor made his report on the fifteenth of February, 1869. On the ninth of June, 1873, Latting's assignee appeared in court, and simply said: "I make myself a party to this suit, and adopt as my own the petition of plaintiff." He prayed for nothing more, for nothing less, than the commercial house of Latting had already asked. To this proceeding on assignee's part a plea of prescription is opposed.

Section 5057 of the Revised Statutes provides that "no suit at law or in equity shall be maintained, in any court, between an assignee in bankruptcy and a person urging an advertisement touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against the assignee."

In this case no right of action accrued to or against any of the parties after the bankruptcy. The assignee brought no suit, did not even file an opposition. In a suit and opposition which he found already filed he asked to be and was allowed to appear as Latting's assignee, to continue what Latting had commenced.

In 1873, before the assignee became a party, the commercial house of Latting had sued for a settlement of the copartnership, and the two partners, Latting and Chambers, had filed oppositions to the auditor's report. All the assignee had to and could do, all he did, was to file an appearance. To what can the invoked prescription apply? Is it to the action then pending, instituted in 1867, and never discontinued? Is it to the assignee's right to file an appearance?

In his evidence, taken under commission, Latting said: "In the fall of 1868 I gave Mr. Chambers a writing stating that upon a final and amicable settlement of accounts between us I found myself indebted unto him in a certain amount, and transferred to him my interest in all the assets of the copartnership. He had paid and assumed to pay its debts."

"If a chose in action upon which a suit has been brought was assigned before the commencement of proceedings in bankruptcy the suit may still be prosecuted in the name of the bankrupt, and the assignee is the only party who can control the transfer." Bump's Law and Practice, p. 128.

Is the assignee, in and as to every case, an indispensable party? As to that, the statute is permissive: "He may or he may not sue. It only becomes his duty to prosecute a suit where the interests of the estate demand it. When he does, he must show that interest. Unless it be to protect some right, there is no reason to make him a party to a protracted litigation. Of the necessity to proceed or not to proceed he is in the first instance the judge." Bump's Law and Practice, p. 128 to 130.

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The plea of prescription is not warranted by the facts. "Plaintiffs do not claim an interest adverse to defendants in or touching any property or right of property of the bankrupt transferable to or vested in the assignee, nor do defendants claim any interest adverse to plaintiffs in or touching any property or right of property." Ninth vol. National Bankrupt Register, p. 38 to 47; fourth vol. National Bankrupt Register, p. 161 and 162.

Defendants contend that Chambers can in no way be considered a party to this suit, and that he should be entirely ignored, inasmuch as the liquidation of a partnership concerns only the partners, and takes place between them without the interference of the partner in commendam. That argument presents two questions:

First—Is the partnership in commendam recognized by our laws, and, if recognized, is the partner in commendam entitled to a share of the profits?

Second—If entitled to a share in the profits, has he or not an action to compel the settlement of the partnership or copartnership, an action to ascertain, fix, and recover that share?

That of the profits he has a proportionate share no one can justly deny. The Code so provides. It is manifest, then, as there exists no right without a remedy, that he has an action to enforce any right which he may have acquired as a partner or as his partner's transferee.

It is therefore ordered that the former decree of this court be set aside, the judgment appealed from annulled, avoided, and reversed, the exception filed by E. K. Bryant on the seventeenth of June, 1873, overruled and dismissed, and this case remanded to the lower court for trial on the merits; the costs of the appeal to be paid by defendants.

No. 6400.

CITY OF NEW ORLEANS VS. JULIUS KAUFMAN ET AL.

The constitutional provision that taxes shall be equal, and uniform, does not prevent the Legislature, or any municipal corporation authorized thereto by the Legislature, from dividing the objects of taxation into different classes, and imposing different taxes on each class. It merely requires that the tax on each member of the same class shall be the same.

APPPEAL from the Superior District Court, parish of Orleans. *Lynch, J.*

S. P. Blanc, Assistant City Attorney, for plaintiff and appellant.

Buck & Dinkelspiel, for defendants.

The opinion of the court was delivered by

MANNING, C. J. The city of New Orleans sues for two hundred and fifty dollars as license tax for pursuing the occupation of junk dealer.

The clause of the ordinance upon which the right to demand this sum of the defendant is based is: "Every member of a company or firm, and every person not connected with a company or firm, keeping a junk store, or old iron, brass, copper, second-hand machinery, cordage, rags, loose cotton, and like articles, two hundred and fifty dollars."

The defendant attacks the constitutionality of the ordinance because of its discrimination of his avocation from the ordinary dealer in merchandise, and, having deposited in court or tendered the sum admitted to be due for license as such dealer in merchandise, prays to be relieved from the larger tax now demanded. He also avers that the tax is not uniform, since it imposes different sums for license on the general dealer in merchandise and the dealer in specified articles, and he denies the authority of the General Assembly to empower the city to impose a tax for trade licenses and professions. He also denies that he carries on a junk store, and alleges that he is engaged in a general wholesale and importing business, the license tax of which is only one hundred dollars.

Worcester defines junk to be pieces of cable or old cordage, used for making points, gaskets, mats, etc. The ordinance has also defined what it means by a *junk store*, evidently intending by the use of the disjunctive conjunction immediately after that expression to show that what followed was an amplification or explanation of its meaning.

A junk store seems to be as clearly defined as a drug store. One of the witnesses, describing the kind of business pursued by defendant, says: "It is a junk shop, a place where anything can be bought or sold, as paper, cordage, old rags, old iron, anything at all that they can sell." The defendant, explaining his business, says he will buy old iron, old rags, old books, old tin pots, ropes, and tin cans. From which it follows that he does keep a junk store; and that this is an avocation, distinct and specific from that of the ordinary dealer in merchandise, is apparent. It forms a class by itself, and its signification is as well understood as are the expressions dry goods store, drug store, or groceries store.

The constitutional requirement that taxation shall be equal and uniform throughout the State (article 118) does not inhibit the Legislature from, nor deprive it of, the power of dividing the objects of taxation into classes, but it does command the law-making department of the government to impose the same burden upon all who are in the same class. It has been held (*State vs. Lathrop*, 10 An. 398,) even that a tax or license may be imposed upon one kind of insurance companies, and another and larger tax upon a different kind, and that, too, when the only difference was that one was a foreign incorporation and the other not. There is much stronger reason to hold that the particular avocation described in the ordinance as a junk store forms a class, separate and distinct from that of a wholesale dealer and importer, in which latter the defendant places himself.

City of New Orleans vs. Kaufman.

It is also urged that the General Assembly is without power to impart to the City Council the authority to levy taxes or collect licenses. The constitution empowers the General Assembly, in the article already quoted, to levy and enforce taxes and licenses, and the power of that body to create municipal corporations and delegate to them the authority to impose taxes, is universally recognized. An eminent writer, Cooley's Taxation, 51, treating of the general proposition that a Legislature can not delegate its powers, says: "One clearly-defined exception to the general rule exists in the case of municipal corporations in the levy and collection of local taxes. Universal custom, which tacitly or expressly has been incorporated in the State constitutions, has made them a part of the general machinery of State government, and in their case the State does little beyond prescribing rules of limitation, within which, for local purposes, the power to tax is left to them, with authority subordinate to that of the State to make rules for its regulation and execution."

The Legislature has empowered the City Council (Acts of 1870, extra session, pp. 35-37,) to levy taxes, and impose a license tax upon all persons pursuing any trade, profession, or calling, and in pursuance of the authority thus conferred the tax now complained of was imposed by the city ordinance. The defendant is subject to the burden thus legally placed upon him, and the judgment of the lower court relieving him of it is erroneous.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court is avoided and reversed, and that the plaintiff now have and recover of the defendant, Julius Kaufman, two hundred and fifty dollars, with five per cent per annum interest from the first day of March, 1876, and costs of both courts; that the injunction sued out by plaintiff is perpetuated, and the lien and privilege of plaintiff upon the property of the defendant, as asserted in his petition, is recognized and ordered to be enforced.

No. 6549.

RENSHAW, CAMMACK & CO. VS. EDWIN C. HERBERT ET AL.

The action to annul a mortgage given by a debtor in favor of one of his creditors, on the ground of simulation and fraud, is prescribed by one year from the date of the mortgage.

A PPEAL from the Ninth Judicial District Court, parish of Rapides, Orsborn, J.

T. C. Manning, for plaintiffs and appellees.

W. F. Blackman, for defendants.

The opinion of the court was delivered by

EGAN, J. Plaintiff sues to enjoin the execution of two judgments

Renshaw, Cammack & Co. vs. Herbert.

against defendant, Herbert, and to annul and revoke said judgments and mortgages given to secure the debts on which they were obtained, on the ground of simulation, fraud, and injury to himself, a judgment creditor of defendant.

The prescription of one year is pleaded by defendants.

The evidence does not sustain the charge of simulation. It appears that the notes secured by the mortgages, and which were the basis of the judgments attacked, were given in lieu of pre-existing notes held by the mortgagees, which were offered in evidence and most of which bore dates anterior to that upon which the plaintiff obtained his own judgment against the defendant, Herbert. There is no evidence to contradict the direct proof of these debts. Indeed, the reality of the debt of defendant, Pickens, is admitted by plaintiff's counsel. If there was fraud which rendered the contracts, mortgages, and judgments attacked liable to be set aside at the suit of plaintiff, it was to secure certain creditors in preference to others. These mortgages had been given more than one year before the institution of this suit to avoid them, which was also instituted more than one year after plaintiff himself obtained judgment against the defendant, Herbert, the common debtor.

The plea of prescription must prevail as to the mortgages sought to be avoided. C. C. 1987, 1994.

As to the judgments to enforce the mortgages, it would follow that the plaintiff can not complain, and their avoidance would be of no advantage to him. Indeed, it is difficult to see how, standing by themselves, junior judgments could affect injuriously a *prior* judgment creditor, or confessing them could be considered as giving an unjust preference over one who had already obtained his judgment more than twelve months before.

The facts of the case sufficiently justified the plaintiff's action to make us unwilling to award damages.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, that the injunction sued out by plaintiff be dissolved, and that there be judgment in favor of the defendants and against the plaintiff, with costs of both courts.

The Chief Justice recuses himself, having been of counsel.

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No. 6613.

A. D. DORIOUCOURT vs. FRANÇOIS LACROIX.

Consequential damages, and damages on account of deprived prospective profits, based on the opinions of witnesses, will not be allowed. C. C. 2008.

The vendee may hold the vendor in damages for the latter's refusal to carry out the sale, for whatever loss the vendee has been thereby caused, and for whatever profits he has been thereby deprived of. C. C. art. 2589 to 2611.

Doriocourt vs. Lacroix.

The measure of damages for a breach of contract is the loss arising naturally out of such breach; or such as is reasonable to suppose was contemplated by the parties, when they formed the contract, as would naturally flow from its breach.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J.*

Charles F. Claiborne, for plaintiff and appellant.

W. O. Denégre for defendant.

The opinion of the court was delivered by

MANNING, C. J. The plaintiff sues for damages for non-fulfillment of contract of sale of certain property in New Orleans. The defendant had permitted his property to become imperiled by the accumulation of arrears of taxes, unpaid for several years, and finally arranged with the city for a sale of several portions of it, which were duly advertised. At this sale the plaintiff bought an improved lot for three thousand two hundred dollars, complied with the terms by paying on the spot ten per centum of the bid to the auctioneer, and received the *procès verbal* of the adjudication. He then tendered the residue of the cash payment, which was by the terms of sale one-half of the bid, and demanded his title. Lacroix never gave it to him, nor offered or attempted to give it to him. Shortly afterward the same property was sold at the instance of a creditor of Lacroix, and bought by that creditor. Plaintiff then sued for two thousand dollars damages, and the return of three hundred and twenty dollars, the sum paid by him at the adjudication.

In other proceedings by rule, the notary was compelled to return this last sum, or what he had left of it, which he did after judgment to that effect, so that the demand for damages is the only question before us. The defense is that he could not make a title, because of incumbrances upon the property, or rather this defense was made under the general denial.

The first material question for consideration is the nature of the claim of plaintiff, for if the object of his demand be the recovery of remote or consequential damages, or for profits which might have been made had the contract been completed, we should reject it. Damages for supposed profits, based upon the speculative opinions of witnesses, will not be allowed. *Gobet vs. Municipality*, 11 An. 300; *Minor vs. Steamer*, 13 An. 364.

Unquestionably, a part of his demand is based upon the supposed loss of profits, and to sustain it much testimony is offered to show that he could shortly afterward have sold the property for an increased price, one witness declaring that five thousand dollars could have been obtained for it. Discarding this means of estimating injury alleged to have been sustained by him, we have the fact in proof that the property was actually sold a few weeks after the adjudication to the plaintiff for four

Doriocourt vs. Lacroix.

thousand dollars, and, therefore, eight hundred dollars will be the measure of his damages, if the law permits him to recover any.

Our Code declares that the adjudication completes the sale, and the purchaser becomes the owner of the property adjudged (C. C., art. 2586, new No. 2608), and that in every contract of sale there is a correlative right and obligation, for as the vendor may hold the vendee to his bid, and make him responsible for the difference in price in a second sale, so the vendee may hold the vendor to his engagement, and make him responsible in damages for losses he may sustain, or profits he may lose. C. C., art. 2589 *et seq.*, new No. 2611.

The sale was instigated by Lacroix, and he was present at the public cry of the property and its adjudication. He not only knew the incumbrances upon it, but the sale was made under an agreement, the object of which was to relieve his whole property by selling enough to lift these incumbrances. The purchaser demanded his signature to the deed, and it was for him to object to receiving the title, rather than for the vendor to refuse to execute it. If the purchaser chose to risk the defect of the title, when no material information was withheld from him by the vendor, it was not for the latter to complain, and he certainly can not make it a ground of refusal to comply with his contract to sell. Reciprocal obligations were created between these parties by the sale. The plaintiff complied with all that were assumed by him, and all that the law imposed on him by reason of his bid. The defendant did nothing, except to entice the plaintiff into assuming a contract which he made no effort to perform.

The Code declares in general terms that the damages due for a breach of a contract are the amount of the loss the vendee has sustained, or the profit of which he has been deprived (art. 1928, new No. 1934), and a recent writer on this subject (Benjamin on Sales, 665,) thus enunciates the rule as well settled, quoting the words of a leading case: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered, either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

We think the sum already mentioned by us the proper amount of damages in this case. We are asked to include in it twenty-four dollars, as the deficit which the notary failed to pay over under the rule, that sum having been consumed in paying costs and commissions, but we find no warrant in the record for that. The proof seems to have been omitted.

It is therefore ordered, adjudged, and decreed that the judgment of

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the lower court is avoided and reversed, and that the plaintiff do now have and recover of the legal representatives of François Lacroix the sum of eight hundred dollars, with five per centum per annum interest from June 4, 1874, and costs of both courts.

No. 6578.

SUCCESSION OF MRS. E. R. HARDESTY.

29	289
52	106

When the judgment appealed from does not condemn the defendant to pay any specific sum, the amount of the appeal bond must be fixed by the judge *a quo*. If the real amount involved is under five hundred dollars, this court is without jurisdiction.

A PPEAL from the Parish Court for the parish of East Feliciana.
Lyons, J.

F. D. Brame and W. C. Flower, for opposers.

Wedge & Moore and W. F. Kernan, for the succession.

The opinion of the court was delivered by

DEBLANC, J. The counsel for Mrs. Hardesty, the appellee, have moved to dismiss the appeal in this case, on the grounds:

First—That the bond is insufficient in amount for a suspensive appeal, and was not filed in time.

Second—That no amount was fixed by the judge of the lower court in his order of appeal.

This appeal is taken from a judgment homologating the final account of an executor. The judgment does not condemn appellants to pay any sum, and this is one of the classes of cases in which the judge can and should fix the amount of the appeal bond. 10 An. 345; 20 An. 108; 21 An. 43.

The judgment appealed from was signed in April, 1876. The day on which it was signed does not appear. A motion for a new trial was overruled on the twenty-ninth of April, 1876, and the appeal bond filed on the ninth of May, within legal delay.

The third ground is fatal to the appeal. The judge has fixed no amount for the appeal bond, but merely granted a suspensive appeal on appellant's giving bond in amount and conditioned according to law. 26 An. 208.

To dismiss this appeal there is an additional reason, and, though our attention was not called to it, we are bound to notice it.

The share inherited from the succession of Mrs. E. R. Hardesty by each of the appellants is \$1212 45, and by both \$2424 90.

The tableau by them opposed was filed on the twenty-eighth of September, 1875, and, in June and December, 1874, they had each received, and so acknowledged, one thousand dollars, and, together, two thousand

Succession of Mrs. E. R. Hardesty.

dollars. The balance of their shares in said succession is, at most, \$424 90, to each \$212 45, which appellee contends and shows was paid to Franklin Hardesty, now dead, and who, at the time the payment was made, represented himself and acted as appellant's attorney.

Even if we were to consider that the aforesaid balance does not constitute two separate and distinct claims, and that, as alleged by appellants, the attorney was without authority to receive it, still the real and only amount involved is under five hundred dollars, and this court is without jurisdiction, *ratione materie*, to pass upon it.

It is therefore ordered, adjudged, and decreed that the appeal in this case be and it is hereby dismissed at appellant's costs.

DEBLANC, J. It is settled, as contended by opponents, that when the creditors of a succession are litigating their rights contradictorily with each other, and the value of the succession exceeds five hundred dollars, an appeal lies to the Supreme Court, though the claim of each creditor may not amount to that sum; but does an appeal lie for the sole reason that an opposition is made to an administrator's account, though the pleadings and evidence show that the claim urged is utterly foreign to the succession? Assuredly not.

In this case the only contest is in regard to the payment made by the executor to one Franklin Hardesty, an attorney-at-law, representing himself as the counsel and agent of the opponents, and whose authority is not denied under oath in the pleadings filed. The amount thus claimed by opposition is \$212 45, alleged to be still due to each of the appellants. If so, by whom is it due? Is it not by either the executor, if he paid to one having no authority to receive, or by Franklin Hardesty's estate, if he had authority to receive and failed to account?

The opponents do not dispute the correctness of the active or passive man, but only ask that the balance of any shares to which may be entitled the representative of Franklin Hardesty be reduced by the amount then received by him in his alleged capacity as their agent and counsel. We refrain from expressing an opinion on this point, and, inasmuch as appellants conceive that our court can entertain jurisdiction of this matter, we will restrict our decree of dismissal to the other ground upon which it is based, and reserve for future adjudication the question of jurisdiction passed upon by us with a view of restoring this controversy to what we considered as its legitimate channel.

It is therefore ordered that, with the reservation made, the decree dismissing the appeal in this case be and it is hereby re-affirmed.

Osborn vs. Segras.

No. 6555.

JOHN OSBORN VS. MICHAEL SEGRAS.

29 291
47 532

A mortgage given to secure a real debt, on which a judgment has been given, will be maintained, although it appear that the judgment, for want of jurisdiction in the court, is void.

The judge of a court who has rendered a judgment which is null and void, can not, as creditor of one of the parties, avail himself of the nullity.

A PPEAL from the Ninth Judicial District Court, parish of Rapides. *Daigre, J.*, Parish Judge, acting for the District Judge, recused.

R. J. Bowman, for plaintiff and appellant.

R. A. Hunter, for defendant.

The opinion of the court was delivered by

MARR, J. On the seventeenth of May, 1869, judgment was rendered in the district court of Rapides parish in favor of Sampson against Malvina Goss, on her confession and waiver of domicile, her residence being at the city of New Orleans. This judgment was recorded on the twenty-ninth of March, 1870, in a separate judgment book, which it seems the recorder of Rapides continued to use, notwithstanding the requirement of the act of 1869, No. 95, section nine, that all mortgages shall be recorded in the same books or series of books. It was recorded as a judicial mortgage in the mortgage book on the first of July, 1874.

On the eighteenth of September, 1874, Malvina Goss, by notarial act, acknowledged that she was indebted to Michael Segras, "the legal holder, owner, and transferee," in the amount for which this judgment was rendered, and to secure the payment she specially mortgaged to him a lot in the upper suburbs of Alexandria. This act was recorded in the book of mortgages on the seventeenth of January, 1875.

John Osborn recovered judgment against Malvina Goss in the Sixth District Court for the parish of Orleans on the twelfth of April, 1873, which was recorded on the thirty-first of May, 1873, in the same separate judgment book, and, on the twenty-seventh of July, 1875, it was recorded as a judicial mortgage in the mortgage book in the office of the parish recorder of Rapides.

Execution issued on this judgment, under which the sheriff seized, and, on the sixth of November, 1875, offered for sale the lot specially mortgaged to Segras. Before the day of sale Segras filed a third opposition, setting up his mortgage and asserting his right to be paid by preference out of the proceeds of the sale about to be made. Osborn bid more than two-thirds of the appraisement, but the sheriff refused to adjudicate the property, because of this opposition, and because the amount bid was not sufficient to discharge the mortgage in favor of Segras.

Osborn answered this third opposition; and he alleged the nullity of

the special mortgage on the ground that the judgment which it was given to secure was void for want of jurisdiction *ratione personæ*. He also charged that the recorder had interpolated the words, "*and known as part of lot four, square twenty-two,*" which were omitted in recording this mortgage, and that this interpolation by interlining was after Osborn's judgment was recorded; that is, after the twenty-seventh of July, 1875.

Osborn also took a rule on the sheriff to compel him to make the adjudication and to convey the property to him in accordance with his bid; and he took a rule on Segras and the recorder to show cause why the alleged interpolation should not be erased.

The sheriff answered that he could not make the adjudication, because the amount bid was not sufficient to discharge the senior special mortgage in favor of Segras, and he acted and relied upon articles 633 and 684 of the Code of Practice.

The recorder and Segras answered separately, but to the same effect, substantially, that the mortgage was filed for record in the office of the recorder on the seventeenth of January, 1875; that in copying into the mortgage book the recorder inadvertently omitted the words of description as stated, and when he discovered the omission he corrected the record by interlining these words as they were in the original; and they also pleaded that the mortgage took effect from the date of filing in the office for record.

The case was tried on these pleadings. The proof satisfied the judge that the alleged interpolation was made before the recording of Osborn's judgment, and that it was properly made to correct a mere clerical error and omission. He accordingly dismissed the rules, and Osborn appealed. The appeal was dismissed on the ground that the appraised value of the lot in controversy was not sufficient to give this court jurisdiction; and this suit was brought immediately after the appeal was dismissed.

The petition sets up the same grounds taken by plaintiff in the two rules just mentioned: the nullity of the judgment of the district court of Rapides against Malvina Goss, because her domicile was at the city of New Orleans; the consequent nullity of the mortgage in favor of Segras, and the fraudulent interlineation of the words omitted in recording the mortgage, without which there would have been no description of the property mortgaged.

The petition also charges that this mortgage was given by Goss on the eve of her marriage with Segras, for the purpose of shielding her property against the pursuit of petitioner and preventing his collecting his judgment.

The prayer is that the judgment in favor of Sampson against Goss, "now owned by said Segras as transferee," be declared an absolute

Osborn vs. Segras.

nullity; that the special mortgage given to secure its payment be also declared a nullity, and that petitioner's judicial mortgage be declared superior to said pretended mortgage.

Defendant pleaded the exception *res adjudicata*, and he introduced the record and proceedings in Osborn vs. Goss in support of his plea. The exception was maintained and the suit dismissed, and Osborn appealed.

All that is set up in this petition touching the nullity of the judgment and of the mortgage and the interpolation of the words omitted in recording the mortgage was passed upon finally in the judgment on the rules in Osborn vs. Goss, and that judgment not only declared the mortgage in favor of Segras to be valid, but that it had been so recorded as to give it superiority of rank and privilege over the judicial mortgage of Osborn. We have no authority to disregard that judgment or to open the questions which it settled and determined.

We may add that the nullity of the judgment for want of jurisdiction would by no means involve the nullity of the mortgage given to secure the debt for which that judgment was rendered. It has not been suggested that Malvina Goss did not actually owe Sampson the amount for which the judgment was rendered, and this indebtedness was ample consideration for the mortgage without regard to the judgment.

Counsel for appellant says in his brief that there is sufficient evidence in the record to enable this court to decide the case upon the merits, and he expresses the hope that we will end this litigation. We infer from this that he attaches no importance to the only new matter set up in this suit, the alleged object of Goss in giving the mortgage in favor of Segras to shield her property from the pursuit of plaintiff. As the case was tried on the exception there was no opportunity for offering proof of this allegation, and if we deemed it material we would remand the cause. But in the view we take of the case this allegation, if proven, would not influence our judgment, and we eliminate it as of no value or significance.

We think the plaintiff is concluded on all the real determining points by the judgment on the rules in Osborn vs. Goss; but if there could be any doubt on that subject there are facts disclosed by the record which we can not ignore or pass *sub silentio*, which were not noticed by counsel on either side, and which we consider fatal to the pretensions of the plaintiff.

John Osborn, the plaintiff, was judge of the district court of Rapides, and he rendered and signed the judgment in favor of Sampson vs. Goss. The petition in that case stated that defendant resided at the city of New Orleans, and she expressly waived domicile in her confession of judgment. The most casual reading of the pleadings would have exposed to the judge his utter want of jurisdiction, and the absolute nullity of the judgment which he rendered and signed.

In *Jones vs. Morgan*, 6 An. 631, plaintiff had been judge of one of the district courts, and he had rendered a judgment separating Morgan and his wife in property and dissolving the community between them. This judgment was manifestly collusive, a fraud upon creditors, and was rendered at the request of the parties upon no other evidence than their acknowledgments in open court. It was a voluntary separation of property by the mere agreement of the parties, which the law declares to be null "both as respects third persons and the husband and wife between themselves." C. C. 2427 (2401).

Plaintiff was a creditor of Morgan and of his succession, and he brought suit against the widow and heirs to subject the property in the hands of the widow to the payment of his debts. He based his right on the nullity of the judgment of separation which he had rendered while he was judge, and which he alleged was collusive and fraudulent. There was no element of nullity wanting; but this court said other persons might avail themselves of the nullity, but the judge who rendered the judgment could not, and whatever might be its effect as to others it was conclusive as to him.

The judge is bound by his oath of office, by his solemn obligations and duty to the public, to administer the law, and he is actively violating his duty when he takes cognizance of a cause and renders judgment without jurisdiction as well of the parties as of the subject matter in controversy. He may do no harm to the defendant who confesses judgment, but it is certainly deluding the plaintiff to render a judgment in his favor which is a mere nullity and which can not be enforced. Judgments import absolute verity; they are accepted as truth itself, and the judge who renders a judgment gives all the assurance which attaches to his official character, of his authority and jurisdiction in the cause, of the truth of the hypothesis of fact upon which the judgment is based, and of his faithful application of the law to the facts. We can not permit a party to invoke for his personal pecuniary benefit and advantage the nullity of a judgment rendered by him in his public official capacity; and he must be held to all the effects and consequences of that judgment precisely as if there were no cause of nullity alleged or existing.

The conventional mortgage of the eighteenth of September, 1874, did not place the property of Malvina Goss more effectually beyond the reach of plaintiff's judicial mortgage than the recording on the first of July, 1874, of the judgment rendered by plaintiff had already done six months before the conventional mortgage was recorded. Plaintiff can no more deny or controvert the legal effect of the recording of that judgment than he can attack the judgment itself by alleging his want of jurisdiction and consequent violation of his official duty. The judgment may be absolutely void, and the recording of it without effect as to all other

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persons, but the judge who rendered it stands pledged to its legality and validity, and he can not be heard to say that it is not valid or to question its effect when recorded as a judicial mortgage so far as his personal rights and interests are concerned. The effect, as to him, is that the judicial mortgage resulting from the recording of this judgment outranks the judicial mortgage under which he claims, and that it gives to Michael Segras a priority and preference over him without regard to the conventional mortgage to which the same effect was given by the judgment on the rules in *Osborn vs. Goss*.

We think the judgment appealed from does justice between the parties, and it is therefore affirmed with costs.

No. 6006.

A. L. SLAWSON VS. ROBERT J. KER.

29 295
48 706

The surety on a bond, by virtue of which a sheriff releases money, or other property, under attachment in his hands, is liable on the bond.

APPEAL from the Sixth District Court, parish of Orleans. *Saucier, J.*

Samuel P. Blanc, for plaintiff and appellant.

Henry B. Kelly, for defendant.

The opinion of the court was delivered by

MANNING, C. J. This suit is upon a bond, to which the defendant is surety, executed by W. E. Hunt, to obtain the possession of certain moneys in the hands of the sheriff, the proceeds of the sale of property which had been attached, the ownership of which was in dispute.

The plaintiff owned and possessed nineteen mules. In 1871, Hunt, a resident of Kentucky, attached them as the property of one O'Brien, his debtor. Slawson intervened in that suit, and sought in vain to effect a release of his property. Failing in this, and to save the expense of keeping the mules, a sale was consented to, the proceeds to be paid over to the sheriff, and to remain in his hands in lieu of the mules until a final adjudication of the rights of all the parties. The sale was to be made by Montgomery, a public auctioneer. After the sale, Hunt applied to the sheriff for delivery of the proceeds to him, and obtained them, at which time the bond in question was executed.

The following answers were made by the defendant on cross-examination:

Question. "Did you not know that he intended to get the money from the sheriff by giving this bond?"

Answer. "I thought, as a lawyer, that the sheriff should not have

Slawson vs. Ker.

taken the bond. If I had been the lawyer of the sheriff, I would have advised him not to take any such bond."

Question. "Did you not know that he was taking that bond to the sheriff for the purpose of getting this money?"

Answer. "I did not think it would be accepted, but I thought it was for that purpose."

Question. "Answer me this question: Did you not know that Mr. Wooldridge intended to get the money out of the sheriff's hands by virtue of that bond?"

Answer. "Yes, I presumed that was the fact."

Upon the trial of Hunt's suit against O'Brien, in which plaintiff was an intervenor, the title of the latter to the property was maintained. Calling on the sheriff for the money, he was presented with the bond, duly assigned to him. The principal was not to be found; the property was gone; the money was gone. Nothing remained but the bond.

The defense is that the instrument sued on was executed in a judicial proceeding, and is invalid, because not authorized by law; that the plaintiff in an attachment suit is not permitted legally to withdraw from the hands of the sheriff the attached property, and that neither plaintiff nor defendant can withdraw the proceeds of the sale of attached property from that officer's hands.

The equity of the case is so strongly with the plaintiff that his recovery can be prevented only by the inexorable prohibition of the law, and if this is a judicial bond, possessing the qualities and attributes of that species of obligation, and none other, the plaintiff is barred by the want of authority of the sheriff, as sheriff, to take it.

Divest the case of the feature that it was the sheriff who took the bond. A party sues his debtor, and attaches property that he chooses to allege belongs to that debtor. The real owner intervenes, and claims it. There is but one of the three that can obtain a release of the property on bond, and he is indifferent what becomes of that which is not his. To keep the property in the custody of the law would consume it. To prevent this, the two who can not bond it judicially agree by a convention between themselves that the property shall be sold, and the proceeds be paid over to a third person, mutually agreeable to them. This third person receives the proceeds of sale, and lends it out, or delivers it to one of the claimants, upon the execution of an obligation to pay it to the other, if he should be determined to be the owner of the property sold, or to pay it back to him, in order that he may pay it to the owner. Can there be any doubt that a recovery can be had upon such a bond? And if this be so, in what respect is the liability changed when it happens that the third person, thus selected by the parties, is an officer of the court before which the litigation is pending?

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The surety to the bond admits that he knew its object was to enable one of the parties to get possession of the money. He signed it in the belief that the party principal would get the money, unless the person who held it was recalcitrant, and if he did get it, that himself would not be bound to replace it. We think otherwise.

We must not be understood as contravening or modifying the doctrine that where a judicial bond is taken by a public officer without authority of law, the bond itself is a nullity, and binds no party to it. But the obligation sued on is, under the special circumstances of this case, an express convention between the plaintiff and intervenor in the original suit, having for its object the provision of a mode of preventing the destruction of the property, outside of the special means furnished by any specific directions of the Codes, and in that respect it is an obligation that we can legally enforce.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court is annulled, avoided, and reversed, and that plaintiff have and recover of the defendant \$2461, with five per centum per annum interest from the eighth day of June, 1873, and costs of both courts.

No. 6607.

UNION INSURANCE COMPANY VS. MRS. DELPHINE BENIT.

An interlocutory decree dissolving an injunction on bond, may be appealed from.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, A. J.*

Henry Chiapella, for plaintiff and appellee.

Frank D. Chretien, for defendant.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

EGAN, J. This appeal is from an interlocutory order dissolving, upon bond, under article 307, Code of Practice, an injunction sued out by Victor Benit, third opponent and intervenor, to prevent the execution of an order of seizure and sale as the property of another of certain real estate in the parish of Orleans the ownership of which is claimed by him.

The case is not before us on its merits, and we can not in this proceeding pass upon the sufficiency or insufficiency of the title set up, or any other matter affecting the merits. The only inquiry is as to the correctness of the order of dissolution on bond obtained by the plaintiff in the seizure. The effect of the dissolution was to allow the sale to proceed.

Union Insurance Company vs. Mrs. Delphine Benit.

This was clearly irregular, and such irreparable injury as to entitle the party complaining to appeal. C. P. 566.

The motion to dismiss the appeal must be overruled. The dissolution on bond is not permissible in such cases.

It is therefore ordered, adjudged, and decreed that the interlocutory order appealed from be annulled, avoided, and reversed, and the injunction reinstated at the cost of the seizing creditor, the Union Insurance Company of New Orleans, and that said appellee likewise pay the costs of appeal.

ON THE MERITS.

The opinion of the court was delivered by

DEBLANC, J. For the reasons given in the opinion delivered on the motion to dismiss the appeal —

It is ordered, adjudged, and decreed that the interlocutory order appealed from be and it is hereby annulled, avoided, and reversed, the dissolved injunction reinstated, and that the Union Insurance Company of New Orleans pay costs in both courts.

No. 5170.

TURNER, WILSON & Co. vs. W. W. McMAIN ET AL.

Legal citation upon one of several solidary debtors interrupts prescription as to all. The interruption of prescription by a suit, works a suspension of prescription, as to every one affected by the interruption, during the pendency of the suit. Mere inaction on the part of a plaintiff, does not amount to an abandonment of his suit.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J.*

E. K. Washington, for plaintiffs and appellants.

Randolph, Singleton & Browne, for defendants.

The opinion of the court was delivered by

HOWELL, J. In May, 1855, plaintiffs instituted this suit on a note for \$5345 53 against the makers, W. W. McMain, F. Vose, and Mrs. L. C. Frierson. Citation was served on McMain only. The case was submitted to the judge in May, 1857, who ordered it to "be put back for further proceedings." In 1873 it was again put on the issue docket, Mr. and Mrs. Frierson cited, default taken as to McMain, prescription filed by Mrs. Frierson, other proceedings had, and judgment rendered condemning McMain to pay the amount of the note and interest, and maintaining the prescription pleaded by Mrs. Frierson, and from the latter part of the decree plaintiffs appealed.

Turner, Wilson & Co. vs. McMain.

It is contended on their behalf that citation on McMain, one of the obligors *in solido*, was a *continuous* interruption of prescription as to his co-obligors.

Article 3552 of the Revised Civil Code provides that "a citation served upon a debtor *in solido*, or his acknowledgement of the debt, interrupts the prescription with regard to all others, and even their heirs."

This only declares the interruption of prescription as to co-debtors. Interruption and suspension are different, and the Code, in treating of the suspension of prescription, does not include the service of citation as one of the causes with regard to co-debtors. As to those who are not in court, the citation operates only as an interruption of the prescription which begins again to run.

This is supported by the fact that the law gives the same effect to both the service of citation and the acknowledgment of the debt. It has never been contended that an acknowledgment is a continuous interruption or a suspension of prescription.

We think the court *a qua* did not err in sustaining the plea.

Judgment affirmed.

ON REHEARING.

The opinion of the court was delivered by

MANNING, C. J. The note in suit is a solidary obligation. Shortly after its maturity suit was instituted against all parties, but citation was served only upon McMain, and W. J. Frierson, the husband of one of the obligors. Mrs. Frierson was cited December 1, 1873, and pleads prescription. This last service was nearly nineteen years after the maturity of the note.

The citation of one of the solidary debtors in 1855 interrupted prescription as to all the others. The liability of Mrs. Frierson will depend upon the question whether that interruption lasted during the continuance of the suit. The suit was never discontinued or dismissed, and ended by a final judgment upon the pleadings and process, as they were filed from time to time.

The counsel for the defendant relies on the declaration of the Code that if the plaintiff abandons or discontinues his demand the interruption shall be considered as having never happened (Civil Code, article 3485, new No. 3519), and, while admitting that frequent decisions of this court have required that the abandonment must be active, he insists that the conduct of the plaintiff in not calling his suit for trial from 1857, when a hearing was had and no decision made, to 1873, when his client was first cited, constitutes such an abandonment as the Code has in view. In other words, that the inaction of the plaintiff is equivalent to an abandonment.

He also contends that the interruption of prescription consequent upon a citation, is the same as that produced by an acknowledgment of the debt, and that in both cases prescription begins to run again immediately (Civil Code, article 3517, new No. 3552), while his adversary insists that when the Code says a suit against one of the solidary debtors interrupts prescription with regard to all (*idem.*, article 2092, new No. 2097), it means that the interruption lasts as long as there is a suit.

The distinction between an interruption and a suspension of prescription is clearly defined, and need not here be elaborated, since it does not enter into this case. Our inquiry is of the nature, extent, and duration of the interruption produced by a suit. Marcadé, treating of the interruption thus resulting, says:

“Et d'abord une demande en justice, l'article ne parle, il est vrai, que d'une *citation* en justice, ce qui pourrait faire croire que l'effet interruptif n'est attribué qu'à la demande formée par exploit introductif d'instance; mais la raison d'it, et tout le monde le reconnaît aujourd'hui, que toute demande en justice, qu'elle soit formée par une citation ou autrement, interrompt la prescription. * * * Ce n'est pas seulement pour le temps antérieur à la demande, que cette demande interrompt la prescription, c'est aussi, comme nous l'avons déjà dit en nos observations préliminaires sur ce chapitre, pour tout le temps que durera l'instance; en sorte qu'une prescription nouvelle ne pourra pas recommencer contre le demandeur avant le jour où sera rendu le jugement par lequel cette instance se terminera. S'il en eût été autrement, si la demande, en effaçant le temps qui s'est écoulé avant elle, eût laissé la prescription nouvelle recommencer à l'instant même, il s'en serait suivi ce résultat absurde, que toutes les fois que le procès aurait duré pendant un temps plus long que le délai de la prescription applicable à l'espèce, le droit du demandeur aurait été anéanti par la prescription nouvelle avant que le jugement fut prononcé. * * * C'est donc une profonde hérésie que celle qui donne à la demande judiciaire l'effet d'anéantir la prescription antérieure en laissant commencer dès le même jour une prescription nouvelle.” *Traité de la Prescription*, p. 124.

Marcadé answers the question which the defendant's counsel addresses to us, whether the plaintiff's remaining quiet for a very long period shall not be legally construed as an abandonment of his suit: “L'interruption dure tant que dure le procès, fut-il de quarante ans, cinquante ans, et plus;” and Troplong is equally explicit: “Du reste, tant que le procès se poursuit, il n'y a pas de prescription possible; l'action durât-elle trente, quarante, et cinquante ans.” *De la Prescription*, p. 298.

We must then inquire if the doctrine of this court has been in accord with that announced by the French commentators. The earliest doctrine was in 1811, *Riviere vs. Spencer*, 2 *Martin*, 83, when it was said that

prescription was interrupted in that case by a suit in 1795 which had been kept alive till 1801, and the new suit was within time, reckoning from the last date, and the court said: "When possession is interrupted, full time must be reckoned from the cessation of the interruption."

The point was met fully in *Driggs vs. Morgan*, 10 Rob. 123, when, considering the interruption of prescription by a reconventional demand, the court said: "Such interruption necessarily exists during the pendency of the action, and until its final termination," and quoted Dalloz: "Il n'y a pas de péremption, ni des lois, de prescription possible, tant que la procédure se poursuit." In a later case, *Wilson vs. Marshal*, 10 An. 331, the language of the court was imperative: "It is impossible for prescription to run while a suit is pending;" and in *Barron vs. Shields*, the court remarked the omission from our Code of those clauses of article 2247 of the Code Napoleon, which declares that the interruption of prescription is considered as *non-avenue* if the suit be informal, or the demand be rejected, and proceeded: "If a suit be instituted upon a note before it is due, and pending the suit the note matures and is protested for non-payment, prescription of that note is interrupted so long as the suit lasts after maturity, even if the suit be ultimately dismissed upon an exception of prematurity." 13 An. 58.

The text of that article of the Code Napoleon is: "Si l'assignation est nulle par défaut de forme; si le demandeur se désiste de sa demande; s'il laisse périmer l'instance; ou si sa demande est rejetée, l'interruption est regardée comme non-avenue." We may add to these comments of the court the observation that the omission of the clause "s'il laisse périmer l'instance" has a special significance. The absence from our Code of that part of article 2247 of the Code Napoleon evinces that its object was to extinguish that "profound heresy" which Marcadé notices as prevailing to some extent among the French legists, and to leave no room for doubt as to the effect of the interruption of prescription by a suit under our law.

One of the decisions referred to by the defendant's counsel in his brief, *Millaudon vs. Beazely*, 2 An. 916, seems to support his theory. The language is: "If it be conceded, as contended for, that the acknowledgment in the one case and the citation in the other interrupted prescription, it commenced again immediately to run as to this defendant, and was completed before the commencement of the present action."

Independent of the loose manner in which the dictum is interjected into the opinion, and of its qualifying term, we may observe that the same court held in the following month that the prescription interrupted by a suit commenced to run from the date of the judgment in that suit; i. e., from its termination, and not its commencement. *Hite vs. Vaught, idem*, 970. These cases are cited in *Richard vs. Batram*, 14 An.

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144, where it was said prescription began to run again in favor of an obligor, at least from the date of the judgment against his co-obligor.

From this review of the decisions of this court it will be seen that the interpretation of the French commentators has been adopted here from an early period, and has been consistently adhered to (unless we may except the isolated dictum in *Millaudon vs. Beazely* as an exception), and we may therefore adopt the language of *Marcadé*, "de tout temps on a reconnu que du moment que les droits en actions prescriptibles sont portés devant le juge, ils ne peuvent plus périr, pas plus par une prescription nouvelle que par l'ancienne." For these reasons—

It is ordered, adjudged, and decreed that the judgment heretofore rendered in this cause be set aside and canceled, and that so much of the judgment of the lower court as sustains the plea of prescription in favor of *L. C. Frierson* is annulled, avoided, and reversed, and that there be judgment in favor of plaintiff against her for the sum of \$5345 55, with six per cent per annum interest from the twenty-sixth day of April, 1852, and costs of both courts, and that the judgment of the lower court against *W. W. McMinn* is affirmed.

No. 5435.

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In a suit for interdiction the fullest investigation into the motives of the plaintiff will be allowed.

In passing on the issue of interdiction, the court will not be controlled by the opinions of experts, but giving to them a respectful consideration, and to every fact bearing on the issue its legitimate weight, will form, and decree its own conclusions.

Mere weakness of mind in the defendant will not justify a decree of interdiction, when in view of all the evidence adduced, such decree is not necessary either for the protection of the defendant's property, or person, or of society.

APPEAL from the Second District Court, parish of Orleans. *Tissot, J.*

T. Gilmore & Sons, and *J. L. Tissot*, for plaintiff and appellee.

Gustave A. Breaux, for defendant.

The opinion of the court was delivered by

MANNING, C. J. Justus Francke seeks the interdiction of his wife, née *Pauline Landreaux*, for habitual imbecility and insanity.

Their marriage was in 1855. In the following year the wife was delivered of a still-born child. In 1857, at the birth of a daughter, she had puerperal convulsions and epileptic fits (*attaques d'éclampsie*). She recovered, and five more children were born, all of whom survive, and are well formed, and present no trace of constitutional infirmity. In 1862 the symptoms of mental disturbance appeared, producing irregular and

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singular conduct, which increased during the following year to such an extent that her mother urged her husband to have her cared for. Medical aid was interposed in 1868, and she was sent to the asylum for the insane in 1869. She was released from that place by a writ of habeas corpus at the instance of her mother in 1870, and has remained under her care ever since. This action was instituted in January, 1876.

The first answer, filed in February, was merely formal, but in May it was supplemented by another, alleging that the wife had instituted against the husband a suit for divorce, prior to his petition for her interdiction, and that the interdiction was sought only to prevent the divorce—that her mental trouble was caused by the cruel treatment of her husband, whose criminal connection with a concubine under the marital roof was neither concealed from her nor her friends, and that through the care and kind attentions of those friends she had now sufficiently recovered a healthy tone of mind as to appreciate the peril and the disgrace of her position, and to take the proper legal measures to extricate herself from it.

Objection was made to the filing of this supplemental answer, but it was permitted, the court being of the opinion that the more regular course would be for objection to be made to the testimony to be offered under it, and accordingly objection was thus made, the testimony admitted, and a bill reserved. The reasons of the court do not appear in the bill, but we think the ruling is correct. In actions for the interdiction of a party for insanity, investigation of the motives of those who are provoking the interdiction are of the utmost consequence. The court will guard with peculiar care the alleged lunatic from interference, springing from a hostile motive, and will weigh with more precision the evidence of lunacy, if the person by whom it is tendered appears to be actuated by a sinister intent.

A commission of physicians was appointed to examine Mrs. Francke, three of whom made a joint report in June, 1876, and the fourth later. Another commission of four other physicians reported in July. These reports, and the testimony of many witnesses, are before us. Before summing up the evidence, it is necessary to speak of the insanity or imbecility or infirmities which the Code (Civil Code, articles 382 and 409, new numbers 389 and 422,) pronounces to be cause for interdiction.

Psychologists have vainly attempted to define insanity. The vulgar notion is, that it consists in an entire deprivation of reason and consciousness, but observation has shown that the insane often possess both of those mental qualities. Locke defined a madman to be one who reasoned correctly from false premises, but that would embrace a very large class who are commonly supposed to be sane. Lord Eldon has the credit of originating the phrase, "of unsound mind," and it is a legal,

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not a medical phrase. It is said that no definition can include all the varieties of the disorder, but the power which is most manifestly deficient in the insane is generally the controlling power of the will. Taylor's Medical Jurisprudence, 2 vol. 476, *et seq.*

It is conceded in this case that the proposed interdict is not insane, and that is the concurrent testimony of the examining physicians.

Imbecility is idiocy in a minor degree. An authority on this subject (Ray, quoted by Wharton & Stille, Medical Jurisp., 1 vol., section 314,) arranges the diseases included in the general term mental derangement under two divisions, founded on two very different conditions of the brain; the first being a want of its ordinary development, the second a lesion of its structure subsequent to its development, in the former of which divisions he places idiocy and imbecility, differing only in degree. The same author informs us that "in imbecility the development of the moral and intellectual powers is arrested at an early period of existence. It differs from idiocy in the circumstance that while in the latter there is an almost utter destitution of every thing like reason, the subjects of the former possess some intellectual capacity;" and, further on: "No cases subjected to legal inquiry are more calculated to puzzle the understandings of courts and juries, to mock the wisdom of the learned and baffle the acuteness of the shrewd, than those connected with questions of imbecility. * * * The real capacity of the imbecile's mind is to be estimated, not from any single trial, but by a careful appreciation of all its powers." Ray's Medical Jurisp., sec. 63, 121-122.

Esquirol, classifying those unsound of mind, says:

"Néanmoins, en étudiant les faits, on peut classer les idiots en deux séries dans lesquelles ils se groupent tous. Dans la première sont les imbéciles; dans la seconde les idiots proprement dits. Dans la première, l'organisation est plus ou moins parfaite, les facultés sensibles et intellectuelles sont peu développées; les imbéciles ont des sensations, des idées, de la mémoire, des affections, des passions, et même des penchants, mais à un faible degré. Ils sentent, ils pensent, ils parlent, et sont susceptible de quelque éducation." *Maladies Mentales*, 2 vol. p. 288.

And last, the author just quoted says: "The term idiot is applied to those who from original defect have never had mental power. Idiocy is marked by congenital deficiency of the mental faculties. There is not here a loss or perversion of what has once been acquired, but a state in which, from defective structure of the brain, the individual has never been able to acquire any degree of intellectual power. * * *

There is a state scarcely separable from idiocy in which the mind is capable of receiving some ideas, and of profiting to a certain extent by instruction. Owing, however, either to original defect, or to one proceeding from arrested development of the brain, the minds of such persons

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are not capable of being brought to a healthy standard of intellect. This state is called imbecility." Taylor's Med. Jurisp. 2 vol. 502. That is the state of Mrs. Francke, according to the counsel for her husband, and the physician who made a separate report confirms it: "Madame Francke est dans l'imbécillité, dans cette imbécillité que la médecine légale regarde comme faisant partie intégrante de l'alienation mentale. Il est, donc, impossible d'admettre qu'elle est saine d'esprit; elle est, au contraire, aliénée pour le médecin légiste." The joint report of the three physicians appointed with Dr. Faget is less pronounced than his, and avoids (as one of them insists) the declaration that she has reached the state of imbecility. Their conclusions are these:

"1o. Que Madame Francke est atteinte d'un affaiblissement des qualités intellectuelles qui va jusqu'à l'imbécillité.

"2o. Qu'elle est incapable de se guider dans la vie et de diriger ses intérêts.

"3o. Qu'il serait dangereux de lui confier l'administration de sa fortune, et de lui laisser l'exercice de ses droits civils.

"4o. Qu'il y a lieu, par conséquent, de prononcer son interdiction."

We do not propose to accept the conclusions of others as to the decree which a tribunal should pronounce upon a given state of facts, but to take the facts themselves, examine their relation to each other, and their bearing upon the grave matter we have to determine. Nor can we be guided or influenced solely by the opinions of medical men who have made the examination of the proposed interdict at a single interview or under the unfavorable circumstances of a consciousness on the part of the sufferer that she is undergoing a test of her sanity. We take the several reports of the physicians as worthy of the most careful examination and the most respectful attention, to be weighed along with other testimony, and all to be considered together in assisting us to our own conclusion. So careful is our law to surround proceedings of this nature with all safeguards, that it permits this court to hear new proofs, and to question the person whose interdiction is sought, in order to ascertain the state of her mind. Civil Code, art. 389, new number 396.

The four other physicians, in giving the résumé of their deliberations, conclude—

"1o. Madame Francke n'est pas atteinte d'aliénation mentale.

"2o. Jusqu'en 1869, elle n'a présenté aucun signe d'idiotie ni d'imbécillité.

"3o. L'imbécillité qui est une infirmité congénitale, n'ayant puse déclarer brusquement à l'âge de trente-quatre ans, il reste prouvé que Madame Francke n'est point imbécile.

"4o. Relates to the source of disorders of the patient.

"5o. Ses facultés intellectuelles sont affaiblies, la mémoire incertaine.

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Madame Francke ne peut pas veiller à ses intérêts personnels (ni prendre soin de sa personne,") ajoute le Dr. Boyer.

The eight physicians are thus unanimous in pronouncing Mrs. Francke not insane, and four of them declare that she is not imbecile. They all concur in saying that she can not take care of her personal interests, or manage property—she is a *pauvre d'esprit*. It is worthy of remark that a leading idea in the minds of the medical experts who thus examined Mrs. Francke was that a part of their function was to ascertain if she was capable of transacting business, of making or understanding accounts, or of supervising or directing the management of property. Unquestionably, the proof is conclusive that she can do none of these things. Her weak intellect, shaken from its poise during the rude ministrations of Mrs. Lause in 1863, toppled over, and her disordered faculties ran riot with the wildest vagaries. This *folie* reached such a point in 1869 that a certificate *d'aliénation mentale chronique* was given by Dr. Deléry, and her confinement in the asylum was effected, and Sister Angèle, a ministrant there, testifies there was no improvement in her condition during the year of her detention.

Of her condition since, the most important witnesses are her mother, with whom she is living, and Dr. Landry, her medical attendant for seven years. And it is impossible, and we may add improper, not to attach greater importance to the information given by those who daily surround a person, and whose watchful supervision is constant, than that given by those who approach one at rare intervals and under exceptional circumstances, whose mission, by its very object, predisposes the nervous and *craintive* patient to increased tension of the feeble mental power left to her.

The change in Mrs. Francke's condition a month after her release from the asylum was, in the opinion of her husband, miraculous. The family physician says that her daily necessities do not require constant supervision, and that he has not seen any thing in her that produced that impression since her release. He is convinced that she could go out and make small purchases at the stores, and recollects her giving an account to her mother of what she had been buying; thinks she could go out upon the streets; the suit for interdiction has produced upon her an extreme fear of having to return to her husband's house, and of having to leave her mother, to whom she clings with childlike tenderness and earnestness. The mother finds her submissive and quiet, receives from her assistance in the minor household cares, and permits her to occupy a separate room, the arrangements of which she personally makes. Jules Lambert, the step-father of Mrs. Francke, and Mrs. Block have lived in the same house with her several years immediately preceding the hearing of the cause below. They speak of her conduct and appearance as

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not in any manner calculated to attract special notice, and say that her daily behavior is characterized by propriety and decorum. The weakness of her mind is conceded by all.

In noting the declarations of the various persons touching the mental condition of Mrs. Francke, we shall not omit that of our learned brother who tried the cause, whose observations upon the questions involved, whether of fact or of law, have attracted our respectful attention. He found her intellectual faculties very weak, and her memory uncertain. She confessed her inability to manage her own affairs, but the judge would not attempt upon such a cursory examination to define her mental condition, and relied more upon the physicians than upon himself. His judgment upon the law and the evidence was for her interdiction.

We have now to consider the matter set up in the supplemental answer, as tending to show the motives of the husband in praying the interdiction of his wife. Her suit for divorce was filed on the twenty-second of January, ten days prior to his suit for her interdiction. The charge made therein of adulterous intercourse between the husband and Ellen Doyle, carried on under the marital roof, is supported by proof. The first fruit of this concubinage was born in the room adjoining the wife's, and the birth of that child has been succeeded by others of the same parentage. Madame Lambert says there is no concealment of the paternity of the children, and one of the counsel for the husband in his oral argument impliedly admits, without palliating, the fault of his client.

The wife expressly alleges, that the object of the husband in confining her in an asylum, was to rid himself and his paramour of her presence. We do not admit this theory. On the contrary, the *folie* had then attained such proportions as to render some restraint necessary. It is also charged that the present suit for interdiction is designed for the sole purpose of preventing the consummation of the divorce. The sequence of the events makes that probable, and it is admitted by defendant to be the fact. And it may be observed that the court has no option in selecting a curator for an interdicted wife. C. C., art. 399, new 412.

Much, and not unnecessary pains, have been taken to acquaint the court with the early life of Mrs. Francke. Her studies during school life, her participation in exercises which preclude the supposition of congenital infirmity, her appearance in society, and her marriage, without suspicion by her family or her husband, of any mental lesion, have been reviewed with care to show that her affliction can not be classified as the imbecility defined by the alienists from whose works we have quoted. It can not therefore be assigned a higher grade in the category of mental diseases than weakness of mind—*faiblesse d'esprit*.

In determining whether this is sufficiently developed to warrant us in pronouncing her interdiction, we must consider the purposes the law has

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in view in such proceedings. The objects to be accomplished are the preservation of the proposed interdict's rights of property, the safety of her person, or the protection of society.

Mrs. Francke has no property. She brought nothing into marriage, and has received nothing since. We can scarcely be asked to interdict her on the supposition that at some future time she will receive property. The well or ill-being of her person has been tested under the different modes of treatment, and we have already noted the result in each, and society does not need from our hands to be assured of protection from this unfortunate and harmless woman. Her story and her condition have provoked our interest, and demanded the most careful scrutiny of this record. It is one of those domestic tragedies whose mournful pathos touches the heart, inflames its sympathies, and well-nigh misleads the judgment. Our opinion is that Mrs. Pauline Francke is not liable, in her present condition, to interdiction under our law.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court is avoided and reversed, and that the petition of the husband, Justus Francke, be dismissed at his costs in both courts.

CONCURRING OPINION.

DEBLANC, J. It can not be disputed that Mrs. Francke has been insane, and that at the date of the trial of this case her mind was still, but slightly, obscured by the receding cloud which settled upon it at the birth of her first child.

Do these facts require, would they justify her interdiction?

For the purposes of this examination I am disposed to admit more than was proven. If, as alleged, she is now an imbecile, when was she stricken with imbecility? Was it from the cradle and by the hand of God? Was it by accident, and before or after her marriage? Whether before or after, can he who led her to the altar, who gave her his name, whose blood is mixed to her blood in the veins of their children, whose sacred obligation is to support, assist, and protect her, be heard in this, his attempt to publish to the world that inherent or accidental misfortune?

He can, but only as a matter of inevitable and inflexible necessity. He can, but in whose interest? Her own and that of society. He can, as a protection to her rights and the rights of others, never as a speculation, or merely because she is incapable of administering her estate.

If, though not highly gifted, she was possessed of an ordinary share of intelligence and reason, and, as presumed by distinguished physicians, lost that share in the nuptial couch in imparting life, should not the husband and father be the first to excuse the cause of her insanity?

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Her intelligence has not perished, it is partly veiled; her reason is lingering, not dead. In spite of sinister predictions, the paralyzed faculties are gradually escaping from the shackles, the grasp of insanity. Science condemns, and after its verdict, wraps itself in its impervious incredulity and looks with a dreadful pity on those who dare hope after it has condemned. Affection hopes and struggles, and its priceless cares have often reversed the solemn verdict of a fallible science.

Defendant is improving, and since when? Since she has been with her mother. The change in her condition amounts to a miracle; this the husband has acknowledged, and, nevertheless, he enters a court of justice to ask her interdiction, and, perhaps, to wrest the deserted wife, the deserted mother, from her parents' home, from those who have accomplished that miracle. The hour is ill-chosen; a decree against the defendant would be equal to a sentence, and none of the causes shown would justify that sentence.

Article 389 of the Civil Code does not command the interdiction of those whose mind is affected. It leaves the court to determine whether there is an actual necessity to interdict, and, in my opinion, that necessity never arises in a home where the unfortunate mother has two daughters to take care of her person, the unfortunate wife a husband to administer her estate, unless she be absolutely uncontrollable, or forsaken by husband and children.

This case has but one object—this is frankly admitted. What is that object? To defeat an action of divorce brought by the wife against the husband. Is that a legitimate cause to interdict the wife? In that action she charges against her husband an open adultery, one commenced under the roof of the common dwelling, and he confesses the adultery. He says that in asking for a divorce his wife was instigated by parties who are moved by selfish and sordid intentions. Is he actuated by pure and lofty motives? What does he dread? Is it the dissolution of the tie which, by a fiction of the law, binds him to defendant? Another has taken her place at the fireside, and there remains to be separated but the property which for years has been administered and enjoyed by the husband alone. His wife is neither dangerous to herself nor dangerous to others, and we can not, to defeat an acknowledged right, to prevent a divorce to which she may be entitled, decree her interdiction.

It is useless to follow in the pathways of science those who have learned how we think, how we love, how we hate, how we live, and how we die. The task would be too difficult, and we have but to inquire: Is Mrs. Francke insane? She is not. Was she born and is she an imbecile? We believe not. Can she take care of her person? She can and does with her mother's assistance. Is she capable of administering her estate? She has none to administer. Four of the physicians who examined her

testified "that since she left the asylum in 1869 there has been in her condition a remarkable improvement." Is not that declaration sufficient to at least suspend the interdiction?

In their supplemental brief plaintiff's counsel contend that though signed by four skillful physicians, one of the reports is evidently the work of a gentleman who, in this controversy, leans to the side of defendant's mother. The report, after consultation, may have been written by the family physician. Does this not increase instead of reducing its value, and can it be fully presumed that in a case of this magnitude, one in which there already was a difference of opinion between the learned experts, three physicians of high standing would have condescended to approve a false report?

We have weighed, with the sincere deference due to real talent, the professional opinions expressed as to the actual condition of defendant's mind. They have not raised the veil of mystery and doubt which cover that condition, and we feel authorized to look beyond these conflicting opinions for those plain, positive, self-evident facts which overcome and crush incertitude, and which are understood and explained without the flickering light of a deceitful science. We have heard friends and strangers, nurses and relations, physicians and alienists; let us hear the pretended imbecile. One of the experts interrogates her:

D. Combien d'enfants avez-vous ?

R. Cinq.

D. Des garçons ou des filles ?

R. Quatre filles et un garçon.

D. Vous n'avez pas eu d'autres enfants ?

R. Oui, un enfant mort-né, et une fille morte brûlée à l'âge de trois ans.

D. Quel est l'ainée de vos enfants ?

R. C'est une fille qui a maintenant dix-neuf ans.

D. Aimez-vous vos enfants ?

R. Mais oui, je les aime.

D. Les voyez-vous souvent ?

R. Non, ils ne viennent plus depuis ces affaires-là.

D. Vous souvenez-vous qu'à une autre de nos visites, vous nous avez dit que vous n'étiez pas fâchée que vos enfants ne viennent plus vous voir ? Pourquoi nous avez-vous dit cela ?

R. Parcequ'ils venaient pour cinq minutes, en grande cérémonie, et qu'ils semblaient ne pas tenir à moi.

D. Quoi ! vous n'avez pas d'autres raisons ?

R. Et puis, ils me parlaient continuellement de cette femme.

D. Quelle femme ?

R. De cette femme qui est la cause de toutes mes tracasseries; de leur Ellen.

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D. Mais si cette femme n'était pas là, et que votre mari voulût vous reprendre chez lui, seriez-vous contente d'aller vivre avec vos enfants et votre mari?

R. Oh ! non.

D. Et pourquoi cela ?

R. Parceque mon mari me remettrait à l'asile, comme il l'a fait une première fois.

D. Mais si votre mari, allant vivre dans son pays, vous laissez vos enfants avec de la fortune, seriez-vous contente alors d'avoir vos enfants auprès de vous ?

R. Ce sont bien là des châteaux en Espagne ! Mais je serais bien heureuse si cela pouvait se réaliser.

Are these answers the wild freaks, the inordinate fancies of an insane mind, the meaningless and extravagant expression of an insane tongue ? We believe not.

Mrs. Francke, we admit, might have been interdicted in 1868 or 1869. She was then insane and predisposed to occasional outbreaks of passion and immodesty; but that time and that occasion have passed; she is now improving. That is denied by a few, asserted by others:

"En admettant l'incapacité de Madame Francke dans l'état où elle est actuellement de veiller à ses intérêts, nous la considérons comme étant un cas exceptionnel, qui mérite l'attention et les égards de tout homme qui porte en lui la dignité de sa profession. Sa mère l'ayant retirée de l'asile a, pendant sept années de devouement et d'abnégation maternelle, amélioré tellement son état, que l'un de nous, le Dr. Boyer, a été frappé du changement qui s'est fait en elle. Nous avons tous connu la douceur, la tendresse maternelle, et les consolations qu'elles apportent aux heures douloureuses de la vie. Mais peut-on mesurer l'étendue et les effets de la douleur chez une mère qui souffre dans l'isolement, loin de toute affection, loin de ses enfants; loin surtout de celle qui a aujourd'hui dix-neuf ans, et dont la naissance peut avoir été l'origine de l'affaiblissement des facultés qui jusqu'alors avaient joui de toute leur force et de toute leur facultés ?

"Nouvelle-Orléans, le — Juillet, 1876.

"Signé:

"J. B. GAUDET,

"H. DE RANCÉ,

"P. C. BOYER,

"A. L. LANDRY."

There is at least a doubt as to the wreck or resurrection of her intelligence and reason, a hope that her depressed and troubled faculties may resume their sway, and we unhesitatingly place to her credit that doubt and that hope.

Family is the basis of society. When and wherever the family fails in

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the discharge of its duties, society is deeply affected. The first of these duties, as between the parents themselves and the children and parents, is to stand by and not to abandon one another in the days of affliction and adversity, and to dispel or calm, with an affectionate hand, the anxieties and sufferings to which we are subject. The quiet and harmless victim, crushed by insanity, or lingering from its effects, is not a criminal, and should not, as a criminal, be incarcerated and deprived of liberty. Her asylum is her home, and the homeless alone, or the mad, should be sent to the asylum. Interdiction is a harsh, it should be the last, resort.

I concur in the opinion delivered by the Chief Justice.

ON MOTION FOR REHEARING.

The opinion of the court was delivered by

DEBLANC, J. Plaintiff's counsel have filed in this case an application for a rehearing. Their last brief adds little to the able and complete argument first submitted by them.

They contend that we have erred in the discussion of the facts and the construction of the law: as to the facts, in attributing to plaintiff motives by which he was not actuated, and in lending our countenance to a charge which, if untrue, would do great injustice to Mr. Francke, his family, and even to the lady whose condition is the subject of this investigation; as to the law, in supposing that the court has no option in selecting a curator.

The facts disclosed on the trial do not show with legal certainty that at the date of said trial, or even during the six or seven years which preceded that date, Mrs. Francke had been insane, nor has it been shown or alleged that her interdiction is necessary in her own interest and to preserve the rights and the welfare of her family.

To interdict is a grave, a responsible task, the most important that a court can be called upon to perform. Insanity, we know, is a misfortune, not a dishonor, but it is a misfortune which, in its results, is equal to a dishonor; it affects the destinies, blights the hopes, of a whole family. The sentence of interdiction, for it is a sentence, when pronounced against a parent, impresses on that parent's name, by whomsoever borne, a badge of suspicion which time itself does not, can not, obliterate. Wee to the son or the daughter of whom it can be said, they are the children of an interdicted!

The husband's right to interdict his wife arises when? Not when the last chance of her recovery has fled, but when her insanity is a danger to herself, her home, or her children; when, unless confined and watched, she would be apt to injure herself, kill her children, or set fire to her

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home; or when, to save her property, to protect her imperiled rights, her signature to an act, her consent to a proceeding, become indispensable, and she is unable to comprehensively give that signature and consent.

There are obligations which are imposed by the laws of God. When disregarded, they should be taught and enforced by the laws of the State.

The French legislation on this subject differs from ours. The first is imperative: "*Le majeur qui est dans un état habituel d'imbécillité, de démence, ou de fureur, doit être interdit.*" Ours provides, "that lunatics, idiots, and those who are incapable of taking care of their persons, or administering their estates, are liable to be interdicted." Then, to authorize the interdiction, two conditions are required: the party sought to be interdicted must be incapable of taking care of his person, and incapable of administering his estate. Those two conditions must exist simultaneously, and their actual existence and the necessity of the interdiction must be shown beyond the shadow of a doubt.

We attach no importance to the well-established fact that in or previous to 1869 Mrs. Francke had been insane. Our investigation can not extend so far in the past. We are not to inquire whether she has been, but whether she is now, insane. It may be that she is, that those who allege so are right, that those who deny are wrong. That fact, however, is not only not proved, but contradicted by experts as intelligent, as distinguished, as those who assert it; contradicted by those who have often conversed with her on occasions less impressive than the solemn visit and solemn interrogation by a council of physicians; contradicted by every one of her answers to those experts.

What was and what is Mrs. Francke's condition? She was not born an imbecile; her insanity was due to the birth of a child. While she was in her husband's house the insanity increased. It was not alleviated in the asylum, and is slowly but positively yielding to her mother's care. In one month, under that care, the change in her condition was wonderful. This was acknowledged by her husband, and struck Dr. Byer.

In his report of the eleventh of February, 1876, Dr. Faget said: "*L'état mental de Madame Francke est celui que les auteurs aliénistes désignent techniquement sous le nom d'imbécillité, c'est-à-dire faiblesse d'esprit. Chez Madame Francke, cette faiblesse d'esprit est portée au point que certainement elle est incapable de gérer ses affaires, et que très probablement elle ne peut pas même se passer des petits soins et de la sollicitude que réclament les premières années de la vie.*"

In his last report he is more positive: "*Madame Francke est dans l'imbécillité—pour le médecin légiste, elle est aliénée—incapable de prendre soin de sa personne et de ses affaires. L'attaque d'écclampsie puer-*

pérale, et, plus tard la manière compromise dans laquelle elle est tombée et retombée pendant plusieurs années, n'expliquent que trop bien son état d'imbécillité. De 1869 à 1876 je n'ai pas revu cette dame comme médecin."

Thus, for seven years, he lost sight of Mrs. Francke, and, after that long period, he met her as an expert appointed by the court to examine her. On that occasion what must have been, what were his impressions? The veil of the past was lifted by the recollections of 1869, and those recollections fell from his memory in his report. He went to, and left her, with the unremoved conviction that she was insane.

The conversation between defendant and the experts excludes the idea of either insanity or imbecility. The answers to their questions were the most rational, the most appropriate, that could have been given. They are on record, and no one could successfully combat that they clearly describe her condition, her feelings, her sorrows, her shattered destiny, those cherished hopes which now, she said, are but air castles. Not one of those answers is marked by an extravagant thought or extravagant expression, and their value in law can not be reduced by the brilliant but naked opinions of the most eminent adepts of an enlightened or difficult science.

Plaintiff's counsel contend that, if the divorce be granted, and if the view we have taken of this case be correct, not less than \$20,000 shall fall under defendant's administration. What of it? If she is not insane, if she is entitled to a divorce, the dreaded consequence shall flow, not from our decree, but from the law and from the husband's fault.

It was not, however, on that charge of adultery, or on that tacit admission of its truth, that we have based our decision; but on the fact that on the trial of this case it was not proven that Mrs. Francke was insane or that she is an imbecile; and it was proven that her condition had remarkably improved, and that she can, at present, take care of her person; that she is not a burden to her husband, or a danger to her children; that she has in no way exposed their rights or troubled their welfare, and that her interdiction can not be claimed or allowed either as a matter of right or of necessity, either in her own or the interests of others.

We are told that we have the right to proceed to the hearing of new proofs or to question Mrs. Francke ourselves. This is true, but why should we do it? She has been examined by the district judge, by experienced and distinguished physicians. We have their reports, their opinions, their views, their impressions, and we are not inclined to again drag in court or to again subject to an additional investigation a nervous, timid, and suffering victim, whose depressed and delicate mind might be confused and affected by what she might construe as a determination to convict her of insanity.

Francke vs. His Wife.

Plaintiff says it was an error to suppose, as he alleges that we have done, that the court has no option in the selection of a curator to the interdicted wife. This, on our part, is no supposition. The Code provides in terms subject to but one construction that "the married woman who has been interdicted is, of course, under the curatorship of her husband." That he may, for cause, be removed or excluded from the curatorship we entertain no doubt, but until the removal or exclusion, what might not happen!

This court has often held in contests for money, land, or cattle, that he who only makes out a probable case can not recover. Should we depart from that rule when asked to destroy a capacity and the rights attached to that capacity; when asked to enslave the will and the functions of that will; when asked to place in charge of a curator the property, the will, the body, the privileges, and liberty of any one? Assuredly not.

Under our law, to justify such a sentence, three causes are indispensable:

First—The indisputable incapacity to administer one's estate.

Second—The absolute inability to take care of one's person.

Third—An actual and unavoidable necessity to interdict.

In this case only one of these conditions, the first, was shown to exist. The rehearing is refused.

No. 6532.

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JOHN I. ADAMS & CO. VS. THOMAS J. DAUNIS ET AL.

National banks, like any other corporations, and the receivers of the same, may sue, and be sued, in the State courts of their domicile.

Where a conflict of privileges on certain property arises, the claims, no matter who the claimants are, must be transferred to, and passed on, by the court, under whose mandate the property was first seized.

The mortgage and judgment creditors, and the purchaser of the mortgage property at judicial sale of the property, can not, by their conventions, perpetuate a judicial mortgage, after the judgment has been extinguished on which the mortgage founded.

A third person can not be affected by any notice of a mortgage, except the notice conveyed to him by the *inscription* of the mortgage. All are third persons, except the parties.

The *inscription* of a mortgage, after the lapse of ten years from the date of *inscription*, unless reinscribed, is utterly void as to third persons, and is no longer any proof of the mortgage, even between the parties to it.

A PPEAL from the Fifteenth Judicial District Court, parish of Lafourche. *Beattie, J.*

Clay Knobloch, for plaintiffs and appellees.

J. D. Rouse and *Andrew J. Murphy*, for N. W. Casey, receiver.

The opinion of the court was delivered by

MARR, J. On the twenty-fourth of February, 1860, Tucker Brothers

executed a mortgage, which was recorded on the same day, on a plantation in the parish of Lafourche, in favor of Robert Tucker or any future holder, to secure four promissory notes for five thousand dollars each, of which two only seem to have been used.

The Bank of New Orleans held one of these notes, and Godfrey Barnsley held the other. The bank obtained judgment against Tucker Brothers on the note held by it, with recognition of the mortgage, which was recorded as a judicial mortgage on the twenty-eighth of June, 1867. Barnsley brought suit on the note held by him, which was not prosecuted to judgment; and it seems to have been discontinued.

Execution issued on the judgment in favor of the bank, under which the sheriff seized the mortgaged property, and sold it on the seventh of September, 1867, to A. W. Cummings, for cash.

The first mortgage in date bore on part only of the property, and was in favor of Gaubert and Richard, who had obtained judgment against Tucker Brothers for the amount due them, which was recorded as a judicial mortgage on the fourteenth of July, 1866; and the next in rank was that under which the bank and Barnsley claimed. The price of the adjudication was not sufficient to pay the amount due these creditors in the second rank. Of course the junior mortgagees were cut off, and the creditors in the first and second ranks were the only persons who were interested in the distribution of the proceeds of the sale.

The sheriff, in his return, after the usual recitals, states that the property was adjudicated to the last and highest bidder, A. W. Cummings, "for and in consideration of the sum of thirteen thousand and twenty-five dollars, *PAID as follows*, to wit:

"First—The purchaser retained in his hands the sum of \$1851 10," the amount due to the first mortgage creditors, Gaubert and Richard, "which amount remained secured by same mortgage."

"Second—The balance of adjudication, \$11,173 90, is applied to the settlement of the claim of the plaintiff and Godfrey Barnsley, each holding a five-thousand-dollar note, secured by the second mortgage * * * in the following proportions, the fund being insufficient to extinguish these claims, viz.: to the bank, to cover principal, interest, and costs, *pro rata*, \$6269 50; to G. Barnsley, *pro rata*, \$4904 40; as will more fully appear by act of compromise and agreement between the parties, etc."

The agreement referred to in the return is of the same date as the sale. It begins with the declaration by Cummings "that he has this day purchased at sheriff's sale, in the case entitled the Bank of New Orleans vs. Tucker Brothers, for cash"; and then follows a description of the property and statement of the price of the adjudication. The agreement then recites: "That the purchase price was not in reality paid in cash; but the purchaser compounded and compromised with the mort-

gage creditors hereinbefore named, who agree to give him time, *without*, however, *impairing or novating their original claims, the right to enforce which they expressly reserve.*"

The payments were to be in three installments. With respect to Gaubert and Richard, declared to be the creditors first in rank, after dividing the \$1851 10, to be paid them, into three parts, as agreed upon, and fixing the dates from which they are respectively to bear interest, the agreement states :

" It is distinctly understood, however, that if any of these installments should not be paid at maturity the whole amount shall be exigible, and Gaubert and Richard shall be and are hereby authorized and expressly empowered to enforce the aforesaid judgment in case No. 487 on the tract to them mortgaged specially by privilege, the said Cummings binding himself to interpose no objection or obstacle thereto."

After dividing the \$4905 40 to be paid to Barnsley and the \$6269 50 to be paid the bank into three parts each, and fixing the dates of payment and the time from which they are to bear interest, the agreement proceeds :

" It is understood, as above stated, that the parties hereto do not by these presents impair, affect, or novate their existing claims, and that in case of non-payment they will be entitled to enforce the judgments which may be held by them, and, furthermore, that the *original mortgages and privileges remain in full force and effects, and are not hereby novated*, and, if need be, for the purpose of avoiding all doubt the said privileges and mortgages are hereby recognized as operating on the said property in the *proportions aforesaid* and to secure the debts aforesaid, with the rank above stated.

" The mortgage of the said Barnsley and the bank results from an act executed before the undersigned recorder on twenty-fourth February, 1860, inscribed in this office on the same day, as will more fully appear by suit No. 578, entitled Bank of New Orleans vs. Tucker Brothers, and No. 793, entitled Godfrey Barnsley vs. Tucker Brothers, on file in the Third District Court of Lafourche."

This agreement was recorded in the book of conventional mortgages on the day of its date, seventh September, 1867.

Pursuant to the sale and adjudication of the seventh September, the sheriff on the ninth September made a deed to Cummings, in which he recites all that he had done touching the sale, and copies his return in full. He then proceeds to "sell, set over, transfer, and convey unto the purchaser, A. W. Cummings, for the sum above stipulated and paid as aforesaid, all the rights, title, and interest which defendants, Tucker Brothers, had in or on the aforesaid property."

The sheriff treated the sale as having been made for cash, and reserved

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no mortgage on the property. The deed was registered on the thirtieth September in the book of conveyances.

In December, 1868, Cummings sold the property to Mrs. Tucker, who assumed to pay the debts for which Cummings had bound himself; and on the same day she sold half of it to Thomas J. Daunis, with whom she formed a planting partnership. Daunis assumed the same debts, but neither he nor Mrs. Tucker gave any mortgage to secure the payment.

On the second of April, 1870, Daunis and Mrs. Tucker mortgaged the property to John I. Adams & Co., and on the first of April, 1871, Mrs. Tucker sold her half to Daunis, who assumed all the debts for which she had bound herself, but he gave no mortgage to secure the payment.

On the twenty-fifth of July, 1875, Adams & Co. required the recorder to cancel and erase the inscription of the conventional mortgage of the twenty-fourth of February, 1860, on the ground that more than ten years had elapsed after the date of this inscription when they on the second of April, 1870, acquired their mortgage on the property, and this inscription had not been renewed.

The recorder complied with this demand, as he was bound to do by the act of 1843, Revised Statutes, sections 450, 3141, amending article 3333, now article 3369, of the Civil Code; and on the twenty-eighth of July Adams & Co. proceeded against Daunis on their mortgage by seizure and sale. The property was sold on the second of October, 1875, and the mortgagees became the purchasers for some \$17,519, less than half the mortgage debt due them. The sheriff refused to complete the adjudication without payment of certain mortgage claims against Tucker Brothers, among others that of the Bank of New Orleans, resulting from the judgment recorded on the twenty-eighth of June, 1867.

Adams & Co. then took a rule on the recorder; N. W. Casey, receiver of the New Orleans National Banking Association, the successor of the Bank of New Orleans; Goodrich & Co., R. & E. L. Tanner, Gaubert and Richard, and the sheriff: the recorder and the several creditors to show cause why the mortgages appearing in the names of these creditors, respectively, in so far as they affect the property in question, should not be canceled and erased; and the sheriff to show cause why he should not complete the adjudication, and put the purchasers in possession.

Casey alone appeared and contested this rule. He pleaded want of jurisdiction; and that the proper and necessary parties were not before the court. He also pleaded a general denial; and set up the judgment against Tucker Brothers in favor of the Bank of New Orleans, recorded as a judicial mortgage on the twenty-eighth of June, 1867, which he alleged had not been paid, and was in full force.

The judgment of the court below made the rule absolute, and ordered the recorder to cancel and erase the several mortgages specified

in the rule, and in accordance with its terms; and the sheriff to complete the adjudication, and to put the purchaser in possession. From this judgment Casey took a devolutive appeal.

The plea to the jurisdiction is twofold: 1. That the national banks can not be sued in a State court, except in the county or parish in which they are located. 2. That the rights of the bank can not be determined on a rule, but only by direct action.

First—As to this latter objection, it suffices to say that in such a case as this the law requires the proceeding to be summary. Code of Practice, 754, 755; Revised Statutes, sections 1942, 2903.

Second—The other plea to the jurisdiction is based upon section fifty-seven of the national bank act, which was omitted in the Revised Statutes of the United States; but is to be found in the appendix, p. 1437, as an amendment to section 5198, as follows:

“Suits, actions, and proceedings against any association under this title may be had in any circuit, district, or territorial court of the United States, held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases.”

We do not understand this section as excluding all other jurisdictions than those specified. The State courts derive their jurisdiction from State law, not from the laws of the United States; and we must look to the State law to ascertain whether a State court has jurisdiction in any given case, except where exclusive jurisdiction is given to the Federal tribunals by the constitution and laws of the United States.

Section 5136 of the Revised Statutes, section eight of the National Bank act, authorizes the banks “to sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.” That is, these banks are corporations, and they proceed and are proceeded against as other corporations. Once vested with this power and capacity, they are amenable to the jurisdiction of the courts of the States in which they are respectively located, just as other corporations or natural persons are; and section fifty-seven of the bank act is merely declaratory, and was not intended as an abridgment of the power and jurisdiction of the State courts, touching property or persons, natural or corporate, within their territorial limits. Of course these corporations, just as natural persons, may have causes in which they are parties heard and determined in the Federal courts, either on original process or by removal in the cases provided by the laws of the United States.

In Louisiana the jurisdiction of the courts depends upon the subject matter in controversy and the domicile of the defendant. The New Orleans National Banking Association had its domicile at New Orleans; and, in an ordinary civil case, it could not have been sued out of the parish of Orleans.

Casey, the receiver, has his domicile at the city of New Orleans; and in like manner he is not subject to the ordinary jurisdiction of the courts of other parishes.

The association was not made a party to this proceeding. The Bank of New Orleans no longer exists. It was converted into the New Orleans National Banking Association in 1871, and Casey, receiver of that association, administered the effects which formerly belonged to the Bank of New Orleans. If the association were a party it would be amenable to the jurisdiction of any State court in which a natural person, having his domicile at the city of New Orleans, could be sued. The case cited by appellant's counsel, Bank of Bethel vs. Pahquoique Bank, 14 Wallace, 388, simply decides that a national bank does not lose its corporate existence by the appointment of a receiver, and that it may still be sued, just as a natural person, in a court of the State, precisely as if a receiver had not been appointed.

The question in this case is not whether this national banking association may be sued in a State court after a receiver has been appointed; but whether, a receiver having been appointed, he is amenable to the jurisdiction of a State court in a parish different from that in which the association was located, and in which also he has his domicile.

By the act of 1841, re-enacted in 1855, p. 497, section thirty-seven, and again in the Revised Statutes of 1870, sections 1942, 2903: "Whenever a conflict of privileges arises between creditors, all the suits and claims shall be transferred to the court by whose mandate the property was first seized, either in mesne process or on execution, and the said court shall proceed to class the privileges and mortgages according to their rank and privilege in a summary manner after notifying the parties interested."

The whole controversy in this case is a conflict of privileges. The property was situated in Lafourche; it had been seized and sold under process of the district court of that parish, and no other court in the State had power or jurisdiction to settle the controversy, and to distribute the proceeds of the sale among the several creditors asserting mortgages and privileges against the property.

Third—The rule required certain persons to show cause why inscriptions of mortgages appearing in their names should not be canceled and erased. These persons were made parties by name, and they appear to have been notified. No other persons whomsoever were necessary parties, because the rights of no other persons were attacked or involved. If any person interested was not before the court, it will be his business to make that fact appear when his rights are affected; but it is not the business of a party who is properly before the court, and who asserts an independent, separate, and distinct right, which must be determined between him and the plaintiff.

It was proven on the trial that the debt due Gaubert and Richard had been paid in full; and that the judicial mortgages in favor of Goodrich & Co. and R. & E. L. Tanner were long subsequent in date to the conventional mortgage under which the bank claimed and the sheriff sold the property. None of these parties have appealed, and the judgment is unquestionably correct so far as they are concerned. The only question is as to the right of the bank; and that depends upon the effect to be given to the conventional mortgage recorded on the twenty-fourth of February, 1860; the judicial mortgage recorded on the twenty-eighth of June, 1876; and the agreement with Cummings, recorded on the seventh September, 1867.

First—So far as the judicial mortgage is concerned, it is obvious that it was extinguished by the sale made under execution issued on the judgment. It was a judgment against Tucker Brothers, and their property was seized and sold in satisfaction of that judgment, and the price of the adjudication was apportioned and distributed by the sheriff among the several mortgage creditors, according to their rank and privilege respectively. It was not in the power of the bank, the seizing creditor, and one of the distributees of the proceeds of that sale, nor was it in the power of Cummings, the purchaser of the property, for cash, to revive that judgment, or to give force and validity to the judicial mortgage, the mere incident and accessory, after the judgment itself, upon which alone it depended, had been extinguished, *pro tanto*, as to the judgment debtors, by the sale of their property.

Second—The agreement between Cummings and the mortgage creditors was anomalous, and in some respects extraordinary. It is clear that Cummings did not grant any mortgage on this property, and as the title of the Tucker Brothers had been divested, and had vested in Cummings by the sheriff's sale, adjudication, and registered deed, the extraordinary circumstance is that these creditors of Tucker Brothers were so careful, took such pains to reserve their original rights, and to stipulate that they should, in case of default on the part of Cummings, enforce their original claims and mortgages against Tucker Brothers, and that these claims and mortgages were in no way impaired, or affected, or novated by the agreement made with Cummings.

Cummings did, indeed, recognize the original mortgages and privileges as operating on the property; but this recognition of mortgages granted by Tucker Brothers no more created a mortgage against Cummings than his recognition of the judgments against Tucker Brothers made him a party to the judgments and subjected him and his property to the process of execution as one of the judgment debtors.

Reduced to its just proportions, this agreement means that the several creditors who were entitled to the entire proceeds of the sale would not

require Cummings to pay them in cash, as he was bound to do by the terms of the sale; that they granted him time to pay; that he recognized their original mortgages and claims as still existing and operating against the property, and obligated himself, in case of his failure to meet the payments as stipulated, to interpose no objection or obstacle to the enforcement of their original claims and mortgages against Tucker Brothers, as if no such sale had been made by the sheriff. Without the intervention of Tucker Brothers, these creditors and Cummings agree that the mortgages and judgments which Cummings was bound to pay in cash, to the extent of the price of the adjudication, should not be paid or discharged, but should continue in force, notwithstanding the fact that the property of Tucker Brothers had been sold, and sold for cash, in satisfaction of these claims and mortgages.

It can not be pretended that the bank could ever, at any time after the seventh of September, 1867, have enforced their judgment against Tucker Brothers by execution or any other process against the mortgaged property which had been seized and sold under that judgment; and the moment the right of the bank to seize and sell that property under that judgment ceased, that moment the judgment lost its effect as a judicial mortgage with respect to that property, and the rights of the bank were narrowed down to the conventional mortgage of the twenty-fourth of February, 1860.

Third—There is proof in the record that one of the Tuckers and Daunis wrote to the bank acknowledging their indebtedness. We are dealing, not with a question of indebtedness, but with a question of mortgage; and a written acknowledgment of indebtedness does not create a mortgage.

It was also proven that Adams & Co., in November, 1874, offered to pay for the bank claim thirty per cent on the amount due seventh September, 1867. Adams & Co. stated in their letter that the bank held a concurrent or second mortgage for \$6269 50; that the inducement for their offer was that Daunis was greatly embarrassed, his property mortgaged for more than its value, and that they were mortgage creditors, and were desirous to have the place kept up as a sugar plantation, "which can only be done by continuous and heavy advances." The utmost effect of this is to charge Adams & Co. with knowledge of the claims of the bank, without in any manner giving them additional force or enlarging their effect.

The jurisprudence of Louisiana seems now to be settled that there is no notice or knowledge of a mortgage by which a third person can be affected other than that which is afforded by inscription in the proper office. There has been some difference of opinion as to the correctness of this doctrine, and we think it not amiss to avail ourselves of this occa-

sion to discuss the question somewhat as *res nova*, instead of contenting ourselves, as we might do, with a mere reference to the decisions of this court.

The Civil Code as originally adopted, article 3314, declared that "mortgages are only allowed to prejudice third persons when they have been publicly inscribed on records kept for that purpose, and in the manner hereafter decreed."

Article 3315 defined the words *third persons*, as used in the preceding article, to be "all persons who are not parties to the act or to the judgment on which the mortgage is founded, and who have dealt with the debtor either in ignorance or before the existence of this right." Under the dominion of this article there was room for the opinion that knowledge supplied the place of inscription.

The act of 1855, No. 274, section two, declares that all sales, contracts, and judgments affecting immovable property which shall not be recorded in the parish where the property is situated "shall be utterly null and void, except between the parties thereto."

The constitution of 1868, article 123, provides that "no mortgage or privilege shall hereafter affect third persons, unless recorded in the parish where the property to be affected is situated."

The act of 1855 is re-enacted in the Revised Statutes of 1870, sections 3188, 3189; and it is embodied in the Revised Civil Code of 1870, articles 2264, 2265, and 2266.

Article 3342 of the Revised Code is a copy of article 3314 of the former editions; but article 3343, which takes the place of the original article 3315, has modified the definition of *third persons* remarkably. It reads thus:

"By the words *third persons*, used in the foregoing article, are to be understood all persons who are not parties to the act or to the judgment on which the mortgage is founded," omitting the last clause, the words which follow "founded" in the original article, as follows: "*and who have dealt with the debtor in ignorance, or before the existence of this right.*"

There can be no doubt that the intention of the law is as declared in the act of 1855, new article 2266 of the Code; in the constitution, art. 123, and in article 3347 of the Code, that a mortgage not recorded in the parish where the property to be affected is situated is utterly null and void, except between the parties thereto.

The inscription, therefore, is as essential to the validity of the mortgage, except between the parties to the act, as the mortgage is to the validity and effect of the inscription. If the inscription loses its effect, as it may by the lapse of time, the mortgage ceases to have effect, except between the parties.

Article 3333 of the original Code was as follows:

"The registry preserves the evidence of mortgages and privileges during ten years, reckoning from the day of *their* date; *their* effect ceases, even against the contracting parties, if the inscriptions have not been renewed before the expiration of this time, in the manner in which they were first made."

The act of 1843, already referred to, amending this article, makes it the duty of the recorders, on the simple application in writing of the owner, creditor of the owner, or other party interested, to cancel and erase all inscriptions of mortgages which have existed or may exist on their records for a period exceeding ten years without a renewal of such inscription. Revised Statutes, sections 450, 3141.

There was some doubt, as the law then stood, whether the mortgage lost its effect by the lapse of ten years from its date, or whether it was the inscription which was thus perempted.

Article 3369 of the Revised Civil Code takes the place of article 3333, and it changes the phraseology of the original article:

"The registry preserves the evidence of mortgages and privileges during ten years, reckoning from the day of *its* date (not *their* date, as in the original); *its* effect (not *their* effect, as in the original) ceases, even against the contracting parties, if the inscriptions have not been renewed before the expiration of this time, in the manner in which they were first made."

The ten years are to be reckoned, not from the date of the *mortgage*, but from the date of the *inscription*, and the effect of the *registry*, not of the *mortgage*, ceases against the contracting parties, etc. One of the effects of the registry, so long as it exists, is that it preserves the evidence of the mortgage or privilege; but when the ten years from the date of the inscription have expired without reinscription before that time, the registry no longer affords proof of the mortgage or privilege, even as against the contracting parties. As the mortgage is utterly null and void, except between the parties, without inscription, it can have no effect whatever as to all other persons after the expiration of ten years without reinscription before that time has elapsed.

Whether this be in accordance with the registry laws of other States, or the decisions of other and the most authoritative and respectable judicial tribunals elsewhere, it is not material to inquire. In most of the States the chief if not the sole object of registry is to give notice, to afford certain means of knowledge to those who may be affected by the contracts which are required to be recorded; and under such a system it may well be held that knowledge, as it is the accomplishment of all that the registry could possibly effect, supplies its place and makes it unnecessary.

Under our system, the registry preserves the evidence of the mortgage. Without it the mortgage is utterly null and void, except between the parties thereto. The language of the law is plain; and it is not possible to avoid the conclusion that nothing supplies the place of registry, or dispenses with it, so far as those are concerned who are not parties to the mortgage; and that when ten years have elapsed after the inscription without reinscription before that time, those who are not parties to the mortgage may safely contract with the mortgager as if no such inscription had ever been made; and they may acquire mortgages on the same property, from the same mortgager, which will outrank all previous mortgages the inscriptions of which have lost their effect by the lapse of time.

On the second of April, 1870, the date of the mortgage under which John I. Adams & Co. claim, more than a month had elapsed after the inscription of the mortgage under which the bank claims had lost its effect. The mortgage in favor of Adams & Co. outranked that mortgage; and, whatever effect the latter may have had during the ten years after the twenty-fourth of February, 1860, it could have had none, except between the parties thereto, after the expiration of that time.

The sale of mortgaged property under execution, for cash, in satisfaction of the mortgage debt, must release and discharge that property from the operation and effect of that mortgage; and neither the conventional nor the judicial mortgage in favor of the bank had any real existence, so far as the property originally affected by them was concerned, after the sale of that property on the seventh of September, 1867.

Counsel for appellant suggest that the agreement of seventh of September, 1867, was not discussed in the court below. We find that it was introduced in evidence by them; and we do not see how the judge could have avoided giving it the effect to which it was entitled, or deciding that it had not the effect claimed for it. It is clearly not a mortgage; and if it appears as a mortgage in favor of the bank it should be canceled and erased, so far as the bank is concerned, under the judgment making the rule absolute.

Our conclusion is that all the mortgage rights which the Bank of New Orleans had with respect to the property in question have long since been extinguished; and the judgment appealed from is therefore affirmed with costs.

The labor of examining this voluminous and closely-written transcript has been greatly increased by the failure of the clerk to observe the first rule of this court, adopted thirty-first of May, 1869. Some long documents have been copied more than once, and the index, of several pages, is merely a reference to the papers and proceedings in the case in the order in which they appear in the transcript, without even an attempt at

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alphabetical arrangement. We think this a proper occasion to call the attention of the clerks to this rule, and to notify them that they incur the risk of having to pay the costs of putting the transcripts in proper order, and of arranging the indexes, where they fail to observe the rule of the court in that respect.

No. 6630.

BAZILE BARTHE VS. SUCCESSION OF J. LACROIX.

A promissory note for a certain sum executed by a person in favor of his employee, payable at the maker's death, although said sum be not legally due, will not be deemed as a donation in disguise, if it appear that the note has for its consideration the natural obligation in favor of the employee, arising out of his long services to the maker.

APPEAL from the Second District Court, parish of Orleans. *Tissot, J.*

J. A. Seghers, for plaintiff and appellee.

Charles E. Schmidt, for defendant.

The opinion of the court was delivered by

SPENCER, J. Plaintiff was for a number of years a trusted employee of the deceased Lacroix. His wages appear to have been only fifteen dollars per month. In 1864, Lacroix being in bad health and sick, sent for two friends, Garlepied and Reyff, and told them he felt under obligations to plaintiff and directed to be drawn up and attested by them a note in plaintiff's favor for five hundred dollars, payable at his (Lacroix's) death. The note was so drawn, signed by Lacroix, and delivered to plaintiff, who kept it until it was destroyed with his other effects by fire a year or more afterward. About twelve years after this transaction Lacroix died, and this suit is brought to recover the amount of said note.

The defense is that the note was given without consideration, and that it was at best a disguised donation, void for want of form, etc.

There was judgment for plaintiff, and the executor of Lacroix appeals.

The plaintiff and said two attesting witnesses were sworn on the trial below, and they fully prove the execution of the obligation as stated. Plaintiff says in substance it was given as a gratuity beyond his wages and for faithful and long service. He speaks of it as a donation for his services. The witness Garlepied (who drew up the note) says he got the impression from what Lacroix said that plaintiff was dissatisfied with his wages and was talking of leaving his employ, and that the note was given to satisfy and keep him. The other witness, Reyff, says nothing of this proposed departure of plaintiff from service, but speaks of its being a donation for services, a gratuity, etc.

Barthe vs. Succession of Lacroix.

It also appears that four or five days after this five-hundred-dollar note was thus given, Lacroix made his will and appointed Mr. Crabites his executor. He at the same time executed a second note for one hundred and fifty dollars in favor of plaintiff, payable on demand, and this was given to the executor with verbal instructions to pay it after his (Lacroix's) death, saying that he wanted "to give a reward to Mr. Barthe, his clerk." The executor swears that Lacroix, although intimate with him and living a number of years after the date of this will, never said anything about having executed the five-hundred-dollar note. The plaintiff swears that this one-hundred-and-fifty-dollar note was given for wages actually due him, and that the deceased afterward paid him one hundred dollars on account of it.

We have read all the evidence in this case carefully, and the conclusion we have reached is that the deceased, Lacroix, being without family, and believing that plaintiff had served him long and faithfully at very small wages, felt that he was under a moral obligation to remunerate him beyond his wages, and executed this five-hundred-dollar note for that purpose.

In one sense it was a gratuity; i. e., he was under no legal obligation to do so. In another sense it was the fulfillment of a natural obligation. We think that there was a good and valid consideration for the note. Under this view it becomes unnecessary to pass upon the questions raised as to the validity of donations disguised under the form of onerous contracts.

Judgment affirmed with costs of both courts.

No. 6608.

SUCCESSION OF JAMES CLONEY.

A judgment homologating the account of an administrator, where no evidence has been adduced to show the correctness of the account, is invalid.

A creditor who has been placed on the tableau of a succession, and recognized as a creditor, may appeal from a judgment homologating an administrator's account, although he may not have opposed the homologation.

The amount to be distributed in the homologated account of an administrator, and not the amount claimed by the appellant, determines his right of appeal.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J.*

McGloin & Nixon, for James Grenon, appellant.

B. C. Elliott, for the succession.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

SPENCER, J. On the 18th of July, 1876, the administratrix filed her ac-

29 327
44 548

29 327
49 970

29 327
50 748
51 1042
51 1043

29 327
52 82

29 327
112 809

Succession of Cloney.

count, on which James Grennon, appellant, was placed as an ordinary creditor for \$350, and on which she put herself as a privileged creditor for the widow's \$1000; also privileged attorney's fees for \$500.

Several oppositions were filed, but none by appellant.

On the the third of August, 1876, on motion of the attorney for administratrix, and on the oath of the deputy clerk that the account had been duly advertised in the New Orleans Republican, the court homologated the account so far as not opposed, without other proof.

On the twenty-second of August, 1876, there was judgment sustaining the oppositions of certain creditors, and dismissing that of M. Hennenmann, and reducing attorney's fees to five per cent. On the same day Hennenmann moved for a new trial, which was, on the twenty-ninth of August, granted.

On the thirty-first of January, 1877, the administratrix filed in the cause, on the trial, a written waiver of her claim to the \$1000, and also a consent that the attorney's fees be reduced to five per cent. The court gave judgment, reciting that all the oppositions had been withdrawn, and homologating the account as rendered.

On the sixteenth of February, 1877, James Grennon, by motions in open court, appealed from the decrees of homologation, of date August 3, 1876, and January 31, 1877.

Appellee moves to dismiss the appeal on the following grounds:

First—Appellant's claim is for only \$350.

Second—The record does not contain certain papers used below.

Third—That the appeal bond is insufficient for a suspensive appeal.

First—The amount of the fund to be distributed determines the right of appeal. It is more than five hundred dollars.

Second—The papers which are properly part of the transcript have been filed. The *mortuaria* was not offered below, and therefore makes no part of the record.

Third—The bond is for the amount fixed by the court. It is good. A bond for costs is all that was required.

The motion to dismiss is overruled.

ON THE MERITS.

The opinion of the court was delivered by

SPENCER, J. The appellant being placed on the account as a creditor clearly has the right to appeal from a judgment unsupported by the evidence. He is a party to the record.

We think the judgments of homologation appealed from are clearly erroneous. That of the third of August, 1876, is unsupported by any proof, even *prima facie*, of the correctness of the account. Where an

Succession of Cloney.

account is not opposed the administrator should at least offer proof sufficient to render probable its correctness. A judgment by default can not be confirmed, except on proof of the correctness of plaintiff's demand. We know no law that changes this rule for administrators. The judgment of the thirty-first of January, 1877, is in direct conflict with the written admissions of the administratrix. She "waives" her claim to be paid one thousand dollars by privilege, and consents to a reduction of the attorney's fees; yet the judgment homologates absolutely an account giving her this one thousand dollars and the attorney's fees without reduction.

It is therefore ordered, adjudged, and decreed that the judgments appealed from be avoided and reversed, and that this case be remanded to the court below, to be there proceeded with according to law, appellee paying costs of appeal.

No. 6270.

MRS. M. A. LALOIRE ET AL. VS. P. S. WILTZ & Co.

The pledgee of a mortgage note, who violates the contract of pledge by pledging the note to a third person, is responsible to the owner of the note for the full amount of the note, unless he clearly proves that the note was worth less than its face. Whoever *actively* violates a contract, need not be put in default.

29	329
50	89
29	828
106	577
29	329
119	40

A PPEAL from the Fifth District Court, parish of Orleans. *Cullom, J.*

Edicard Phillips, for plaintiff and appellee.

F. D. Chretien, for defendants.

The opinion of the court was delivered by

SPENCER, J. The plaintiff, Mrs. Laloire, being indebted to defendants in the sum of \$2721, with eight per cent interest from April 20, 1873, gave to them in pledge a note of F. Bérard for four thousand dollars, bearing eight per cent interest from the thirtieth of December, 1872, and due first of December, 1873. The act of pledge bears date the tenth day of April, 1873.

The defendants being in need of money, in their turn pledged this four-thousand-dollar note (which was secured by joint mortgage and vendor's privilege on a plantation in St. Martin) to the New Orleans Mutual Insurance Association for its full amount to secure a loan of twelve thousand dollars, without advising the company of the nature of their title or limiting their pledge of it to the amount of their debt against plaintiffs. P. S. Wiltz & Co. soon after failed, and the insurance company disposed of the note to Hambro & Son, of London, in *absolute property*, and these last, through their agent, Halsey, foreclosed the mortgage and bought the plantation.

Mrs. M. A. Laloire vs. Wiltz & Co.

Plaintiff brings this suit against P. S. Wiltz & Co. to recover the excess of the pledged note over the amount of her indebtedness.

Defendants answer by a general denial, and plead that plaintiff has not put them in default; that plaintiff has never paid or offered to pay her indebtedness to them; that they had a right to pledge the four-thousand-dollar note, and did so in good faith.

There was judgment for plaintiff, and defendants appeal.

Conceding for the sake of argument that defendants had a right to pledge the note held by them in pledge, they certainly had no right to pledge a greater interest therein than they had themselves. By their pledge to the insurance company *they put it out of the power* of themselves or the plaintiff to redeem the note by paying the \$2724 for which it was pledged to defendants. The defendants *actively* violated the contract of pledge, and there was no necessity of putting them in default. O. C. C. 1926, 1905, No. 8.

The defendants having disposed of the pledge in violation of their contract, can not avoid liability for its amount by indefinite statements of witnesses that the property mortgaged and sold to pay the note did not bring the amount of it. The maker of the note may be perfectly responsible outside of the mortgaged property, and defendants have put it out of their power to return the pledge. If the note pledged was not worth what it called for, the onus of proving it was on defendants. We find no proof of that fact at all satisfactory.

We think there is no error in the judgment of the court below, which is accordingly affirmed with costs of both courts.

No. 6562.

JACOB C. VAN WICKLE VS. ALCÉE LANDRY.

A mortgage on property exempt under the homestead act can not be enforced; and the owner of such property may sell the same, *free from the mortgage* he has imposed on it.

A PPEAL from the Seventh Judicial District Court, parish of Pointe à Coupée. *Heine, J.*

Edward Phillips, for plaintiff and appellant.

Charles Parlange, for defendant.

The opinion of the court was delivered by

MANNING, C. J. This suit is upon a promissory note of defendant, the payment of which is secured by a mortgage upon a tract of land containing about sixty-seven acres. The plaintiff asks a payment for the amount of the note and interest, and for the recognition and enforcement of the mortgage.

Van Wickle vs. Landry.

The defendant admits the execution of the note and mortgage, and denies that the mortgage can be recognized now or enforced hereafter, because the property is exempt from seizure by the provisions of the homestead act of 1865. Rev. Stat. of 1870, sec. 1691.

The court *a qua* rendered a personal judgment against the defendant for the amount of the note and interest, and sustained his plea of exemption of the land and improvements from seizure.

If this were a *nova quaestio* in this court, whether the execution of a mortgage by a debtor is not of itself a waiver of the exemption of the property mortgage, we should be inclined to give to this deliberate act of mortgage a significance and effect in keeping with the express declarations of the mortgager, but the scope and effect of the act providing for the exemption has been too often adjudicated by this court to permit its consideration as an original proposition, and it is in deference to the doctrine of *stare decisis* that we adhere to the ruling already made.

The proof sustains the plea of exemption. The defendant has no other property, nor has his wife, and the land and improvements are not worth more than six hundred dollars. The quantity is less than that allowed in the act. The defendant is the *bona fide* owner of it, and is the head of a family, and has young children dependent on him for a support, and he occupies it as a home. Plaintiff insists that the judgment should restrict the operation of the exemption to the period when the property in question shall be used as a homestead. It is conceded that a party, in whose favor a certain quantity of property has been adjudicated as exempt from seizure, may sell the exempted property, and his vendee would acquire a title, unincumbered by the mortgage granted before such adjudication. It would seem then that the judgment of exemption is a perpetual bar to the enforcement of that mortgage. The most usual form in which these claims for exemption have come before this court has been an injunction by the debtor, restraining the creditor from subjecting, or attempting to subject, the exempted property to satisfaction of his judgment, and the decree of this court has been a perpetuation of the injunction. *Leblanc vs. St. Germain*, 23 An. 289. *Robert vs. Coco*, *idem*, 199.

If we can not decree the enforcement of the mortgage now because of a legal obstacle, if the law exempts the property from seizure so unqualifiedly that a mortgage voluntarily imposed on it by the debtor is held not to bind it, and if the exemption is so complete that the owner may convey the property by an unincumbered title, it would seem that no future contingency can revivify a mortgage thus declared to be extinct. A mortgage which no court can enforce, when its enforcement is judicially demanded, can not have such validity and vitality as to entitle it to recognition with a view to its future enforcement upon the happening

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of an uncertain contingency. The judgments of courts should not be temporary, contingent, or conditional.

The interpretation of the homestead act by this court assures to the debtor, who proves himself to be within its provisions, property of a defined quantity and value, in spite of his own efforts to incumber it, and even annuls the lien himself has placed upon it. The provision thus made for him was intended to be permanent, and can not be restricted by the uncertain contingencies of the future.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court is affirmed with costs.

DISSENTING OPINION.

SPENCER, J. I can not concur in the conclusions of the majority of the court in this case.

The homestead act being exceptional in its character, in derogation of common rights, and restrictive of commerce, ought not to be extended beyond the scope of its plain and manifest terms. The law declares that the property of the debtor is the common pledge of his creditors; that real estate may be mortgaged; that contracts not forbid by law or morals are laws between the parties. Laws taking property out of commerce, and out of the operation of these great, universal, and elementary principles can not be extended by construction or intentment. The homestead act does not forbid the sale of the property subject to it, and therefore the debtor may sell it. It does not more forbid the mortgaging of it, and therefore it may be mortgaged. It only says that it shall be exempt from seizure and sale when "*owned by the debtor,*" and "*occupied by him as a residence,*" and when he "*has persons depending upon him for support.*" All of these conditions must co-exist and concur to give exemption from seizure. As long as these conditions exist the property can not be seized.

That is the full extent of the law. It goes no further, and we can not extend it. It follows that if these conditions do not exist, or, if having existed they cease, the exemption is gone with them. A man can not acquire a vested right to a homestead. The repeal of the law creating it, even after he has had it adjudged to him, will extinguish it. So a change of state in the owner may have the same effect. Thus a widow marrying again, or a married man losing his wife and children depending on him, can not claim the exemption. If the owner, whether before or after having claimed and had adjudged to him a homestead, abandons it as a place of residence, it ceases to be exempt. The law exempts the implements of one's trade by which he gains a living. The books of a lawyer are exempt, but only while they are the implements of his trade.

Van Wickle vs. Landry.

If he change his profession or cease to practice, they again enter into commerce, and become subject to the ordinary rules of property. Had the debtor in this case at bar sold the property in controversy before claiming the homestead, there is no doubt it would have passed subject to the plaintiff's mortgage and could have been seized and sold to pay it. How can a subsequent sale have a greater effect? How can the decree of this court divest that property of plaintiff's mortgage? Judgments are not creative, but declarative of rights, and assist in their execution.

In my opinion the judgment of the court should stop where the law stops. It should declare the property exempt from seizure and sale under plaintiff's mortgage upon the same conditions that the law declares it exempt, to wit: while *bona fide* owned by the debtor and occupied as a residence, he having persons dependent upon him for support, etc. When these conditions cease to exist, the exemption should cease—*ratione cessante cessat ipsa lex*. A repeal of the homestead law, or what is the same thing, the cessation of the conditions of its operation, extinguishes the rights under it.

I therefore conclude that plaintiff should have judgment for the amount of his debt, with recognition of the mortgage claimed, but suspending the execution of it upon the property as long as the conditions required by law for establishing a homestead exist.

No. 6570.

MRS. MARY L. HARDIN VS. WOLF & CEF.

The holder of a mortgage, given by a wife with her husband's authority, on her separate property, *without* the authorization of the judge under the act of 1853, must prove that the debt which the mortgage was given to secure inured to the wife's separate benefit, before he can hold her liable.

A wife separated in property is liable for her proportion of the household expenses, and for the whole of such expenses, if her husband is without means.

The homestead law embodies, in part, the public policy of the State, and rights acquired under it can not be waived by any convention of parties.

A PPEAL from the Sixth Judicial District Court, parish of St. Helena.
Kemp, J.

H. M. Carter, for plaintiff and appellant.

J. M. Wright, for defendants.

The opinion of the court was delivered by

EGAN, J. This action is against a married woman separated in property from her husband. It is based upon a promissory note and mortgage executed by her, *with* the authorization of her husband, but *without* that of the judge, and upon a small balance of account with

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e120 752

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plaintiffs' merchants at Osyka, Mississippi. The defendant pleaded the want of authority to contract the debt, or to execute the note and mortgage, denied that she purchased the goods, etc., as alleged by plaintiffs, or that she authorized their purchase, and specially denied that the articles named in the account of plaintiffs, or the consideration of the note and mortgage, inured to her separate benefit. The mortgage was by public act, and contains the usual pacts, and also an express waiver of all claim of homestead exemption under any existing or future laws of the State.

The first question to which our attention is invited by the answer and the brief of defendant's counsel is the effect of section 3981, 3 R. S., and arts. 126 and 127, R. C. C., which are but a re-enactment of the act of 1855, "to enable married women to contract debts and bind their dotal and paraphernal property with the authorization of their husbands and of the judge, and upon the certificate of authorization of the latter." This is not an open question. In the case of *Rice vs. Alexander*, 15 An. 54, it was held "that the law, as it stood, in regard to the contracts of married women, previous to the act of 1855 referred to, remains unchanged, except that a married woman taking the benefit of that act is placed on the footing of a *femme sole*, and her contract, made with the judge's authorization under the statute, is sufficient, or, in the language of the act, "full proof" against her, while under the general jurisprudence those who deal with a married woman are bound to see and prove that the contract made with her inures to her benefit. The authority to execute the note and mortgage in the case at bar was given by the husband, *who signed both* with the wife for that purpose. It remains, then, to inquire whether the plaintiffs have shown sufficiently the liability of the wife defendant by evidence outside of the note and mortgage. The husband is deaf and dumb, and without property or means of support of himself or family, the wife is separate in property from him, and owns the only property in the family, consisting of a tract of land upon which they reside, and which, in the years 1873-74, was cultivated by two sons of the family for the common benefit and support. Early in 1873 the defendant, Mrs. Hardin, gave plaintiffs a mortgage upon her land to secure them for advances of supplies, etc., to be made for the use of the plantation and family.

The evidence shows that these supplies were furnished accordingly, and that subsequently the mortgage and note now sued on were given *with* the husband's authorization, in lieu of the original mortgage, which was given by the wife alone, without the husband's authorization, and to cure that defect. The wife, whose testimony was taken in the case, admits signing the mortgage, and that she signed it supposing it might assist her sons in cultivating the crop; that the family were supported

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by the farm; that she relied on the revenues arising from the crops for support, and that no member of the family owned or possessed any lands or real estate. It is further shown that she subsequently acknowledged the indebtedness when the account was shown her, and begged indulgence when plaintiffs threatened to foreclose the mortgage. It is quite likely that the plaintiffs took advantage of the necessities of the family, and also took into account the risk, and charged exorbitant prices. The defense was not, however, based upon this ground, nor does the evidence enable us to determine it, much as we would feel disposed to do so. It is shown, however, that the defendant was separate in property, was the sole property owner, that the credit was given to her, and articles for the use of the family and plantation furnished upon the faith of that credit, and that her husband had nothing and no means of support. R. C. C., article 2435, provides "that the wife who has obtained the separation of property must contribute in proportion to her fortune and to that of her husband both to the household expenses and to those of the education of their children." And again: "She is bound to support those expenses alone if there remains nothing to her husband; and even when the husband has property, if all that of the wife be paraphernal and she has reserved to herself the administration of it, she ought to bear a proportion of the marriage charges equal, if need be, to one-half her income." R. C. C. 2389. She may, also, with the authorization of her husband, bind herself as surety for any other person than her husband. 2 An. 903; 5 An. 369; 14 An. 15. Her separate property is also liable for her frauds without reference to the question of authorization. 2 An. 1; 6 An. 56; 10 An. 433. Under this principle, having induced the credit, she would be bound, and her separate property liable. It is also immaterial whether, according to plaintiffs' theory and evidence, the consideration inured to her own advantage and that of her separate property, whether, according to her theory or statement, the mortgage was given to assist her sons, or whether the debt was contracted for the support and maintenance of the family, she being the sole property owner, as we have seen.

The only remaining question is as to the right and power to waive the homestead exemption, as was done in this case. The determination of this question is the more important, because, homestead exemptions being comparatively recent in Louisiana, there has been no adjudication by this court on the subject. In other States it has been often considered, and the adjudications have been by no means uniform, while in most it is regulated by statute. In a majority of the States, however, it is held that such waiver is ineffectual and will not be enforced. See Smyth on Homestead and Exemptions, section 542, citing 15 Cal. 266; 22 N. Y. 249; 9 How. Prac. R. 547; 10 How. Prac. Rep. 282; 9 Am. Law Reg. (Ia.) 112;

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1 Am. Law Reg. (N. S.) 553 ; 16 Iowa 415 ; 20 Iowa 376 ; 16 Iowa 243 ; 7 Wis. 582 ; 20 Pick. 90 ; 2 Cald. (Tenn.) 283. In Pennsylvania, where the right of waiver seems not to have been questioned before, in the case of Forrester vs. Mack, 49 Penn. (13 Wright) 387, decided in 1865, the court says: "If, with the experience and observation we have had, we were now to pass upon the question for the first time we would be very likely to deny the right of waiver altogether, and stick to the statute as it is written." In Crawford vs. Lockwood, 9 How. Prac. R. 547, the court refused to enforce a waiver of "the benefit of all and every exemption of property from sale on execution under the laws of the State." In Harper vs. Leal, 10 How. Prac. R. 276, the debtor made a promissory note, and for the payment of the same agreed "to waive all exemption to property," and the court said: "Not only am I of opinion that the agreement in this note to waive all exemption to property creates no estoppel, but I go further, and hold that it must also be regarded in the eye of the law as a hard, oppressive, and unconscionable contract, and that it is totally void, as in contravention of the spirit of our statutes and of public policy." In Kruette vs. Newcomb, 31 Barb. 169, the same principle was affirmed. The note on which the judgment in that case was recovered expressly waived and relinquished "all right of exemption of any property I may have from execution on this debt." The judges all concurred that a person contracting a debt can not agree with the creditor that in case of non-payment he shall be entitled to levy his execution upon property exempt from levy by the general laws of the State. In Curtis vs. O'Brien, 20 Iowa, 376, the same doctrine was maintained, and such an agreement was held contrary to public policy. The same author before referred to, Smyth on Homestead and Exemptions, the latest and fullest work on the subject which we have seen, published in 1875, after a large experience of exemption laws in most of the States, and upon a review of all the authorities, says with much force (section 545): "The statutes which allow exemption are based upon views of public policy, intended for the preservation of families against the improvidence or misfortune of the head, and the latter can not, by any executory agreement, waive such exemption; because if effect were given to such waiver a few words contained in any note or obligation would operate to change the law between debtor and creditor, and if they were enforceable, such words would generally by inserted in obligations for small demands, and so frustrate the intention of the Legislature."

That such was the object of the homestead exemption under the laws of Louisiana, and that it was not intended for the benefit of the debtor, but for the protection and benefit of the family, is apparent from the provision requiring not only that the property be occupied as a residence and *bona fide* owned by the debtor, but that he shall have a family, or

mother or father, or person or persons dependent upon him for support. C. P. 645. As has been said before, we have nothing to do with the policy or impolicy of the law. As was said in the Pennsylvania cause, *ita lex scripta est*, and the judicial department of government is bound by it. To permit the waiver of the exemption, would be to revise the policy of the law at the option of the debtor, for whose personal benefit it was evidently not designed, and we are unable to perceive why it should not be considered immoral and against the interests of society to permit one who has given a mortgage to claim the benefit of the exemption from its operation, and that it should be so considered where he had simply, in an executory agreement, added the words of waiver. In our opinion one act is as immoral as the other, and neither rests on that ground, but on the policy of the law-maker. Arguments on that subject apply equally to the operation and effect of usury laws which enable the debtor not only to refuse to pay the excessive interest, but to recover it back within a year, and also to all statutes creating exemptions which violate the doctrine of common pledge equally with that now under consideration. The same may be said of all bankrupt and insolvency laws which provide for the release of the debtor from his obligations without payment in full.

The rich and prosperous condition of Louisiana before the war, when every one was independent, as a rule, and the contrary an exception rendered homestead exemptions unnecessary. No sooner had the war ended, however, than, owing to the prostrate and impoverished condition of the people, both here and in several of our sister States of the South, the protection of the debtor's family against absolute beggary through his fault or misfortune began to be guarded against by the passage of homestead exemption laws. Ours was immediately and earnestly pressed to its passage at the extra session of the Legislature in the fall of 1865, thus evincing the public policy and demand. The exemption then made has continued through every successive change of legislation and government, and may now be considered with us, as it has long been with other States, and especially with the great and growing West and the Pacific slope, as part of our settled policy. As to whether this policy be good or bad, wise or unwise, about which there are and have always been, and always will be, conflicting opinions, it is not our province to determine. It is enough that we find it so, and it, therefore, becomes us to deal with it by the light of the experience and observation, the wisdom and the jurisprudence of other States where similar laws have been of longer existence and of more extended operation. In the new West, as in our sister State of Texas (see 14 Texas Rep. 449), this policy of homestead exemption has been largely influenced by a desire to invite new population of men of families and small

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means, to develop their resources and build up the country with the fresh scope given to their industry and enterprise from the assurance that under all circumstances the shelter for their families was secured to them against disaster or misfortune in business. And where would the same motive find more appropriate place than in Louisiana, where the influx of a new and hardy yeomanry would prove a panacea for all troubles, political and material.

There is another view to take of this question of waiver of homestead exemption. In several of the States, as in Connecticut and Alabama, for instance, the levy on exempt property is considered the same as a levy on a third person's property, and the officer who makes such seizure is liable for a trespass. See Smyth, section 547, citing 16 Conn. 144, and several cases from Alabama and Pennsylvania. In Louisiana a highly penal statute to the same effect was passed in 1874, p. 53, and again in 1876, p. 123, while nowhere is the penalty of nullity more fully denounced against all acts and contracts in contravention of public policy, R. C. C. 1893 and 1895; and by an express provision of our law (C. C., art. 12), whatever is done in violation of a prohibitory law is void, though its nullity be not formally directed.

For the reasons stated, it is therefore ordered, adjudged, and decreed that the judgment of the court below be avoided and reversed so far as it recognizes and seeks to enforce the waiver of exemption of the homestead of the defendant, which is hereby decreed exempt as such from seizure or sale under plaintiffs' mortgage and judgment, and that in all other respects it be affirmed. It is further ordered that plaintiffs pay the costs of appeal and defendant the costs of the court below.

CONCURRING OPINION.

MARR, J. The exemption of property from the pursuit of creditors is by no means a new feature in the law of Louisiana. The Civil Code of 1825, article 1987, exempted the right of personal servitude, of use and habitation, of usufruct to the estate of a minor child, the income of dotal property, money due for the salary of an office, and wages, or compensation for personal services.

The Code of Practice, article 644, exempted the linen and clothes, and the beds of the debtor and his family, his arms and military accoutrements, and the tools and instruments necessary for the exercise of the trade or profession by which he gains a living.

The act of 1843 exempted, in addition, corn, fodder, hay, provisions, and the supplies necessary for carrying on the plantation to which they are attached for the current year.

In 1852, by act No. 255, the widow and children left in necessitous cir-

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circumstances were entitled to be paid in preference to all other creditors, except the vendor, as much as one thousand dollars out of the effects of the succession; and in the same year, by act No. 324, the lot or piece of ground and buildings thereon occupied as a residence and *bona fide* owned by the debtor having a family were exempted to the value of one thousand dollars; also, necessary housekeeping effects to the value of two hundred and fifty dollars, the books of the family library, family portraits and pictures, and the books, instruments, and apparatus of the trade or profession of the debtor.

Then came the act of 1865, which exempted one hundred and sixty acres of ground and the buildings and improvements thereon, occupied as a residence and *bona fide* owned by the debtor having a family, or mother, or father, or person or persons dependent on him for support; also, one work-horse, one wagon or cart, one yoke of oxen, two cows and calves, twenty-five head of hogs, or one thousand pounds of bacon or equivalent in pork, and, if a farmer, the necessary quantity of corn and fodder for the current year, not to exceed two thousand dollars in value.

This was followed by the exemption of household and kitchen furniture, not exceeding six hundred dollars in value, sewing machines, and pianos. 1872, 1874, 1876.

Similar exemptions are to be found in the statutes of most if not all of the other States, and in the laws of the United States. The act of Congress which authorizes collectors of internal revenue to enforce the payment of taxes by distraint and sale of the property of delinquents without judicial process (Revised Statutes, section 3187) and the bankrupt act (Revised Statutes, section 5045) make liberal exemptions in favor of the debtor who is the head of a family, and the latter act exempts such additional property as may be exempt by the laws and constitution of the State in which the debtor has his domicile as existing in the year 1872.

The universality of these laws, and the steady enlargement of the exemptions in our own State, have closed the question as to their expediency, if that could be the subject, legitimately, of judicial inquiry; and these laws are not to be regarded with disfavor nor construed otherwise than as remedial statutes, the plain manifestations of a well-settled public policy.

The homestead act of 1865 exempts from seizure and sale under execution the property of the debtor having a family, etc., dependent on *him* for support, occupied as a residence, etc. It would be a narrow and strained limitation of this act to limit it to *men* alone, and to exclude from its benefits a *woman*, wife of a deaf mute, an imbecile, who can give her no assistance in providing for his wants and necessities and those of their offspring. The law looks to the head of the family, to the

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person who is the debtor, and upon whom rests the burden of maintaining the family; and its terms are broad enough to include that person, whether husband, or wife, or widow, or a man or woman never married.

The right of the debtor to claim this exemption is in no manner impaired by the granting of a mortgage, and it is difficult to perceive the advantage, in a moral point of view, in favor of the mortgager who has not, over the mortgager who has, waived the exemption. In either case the exemption would deprive the mortgagee of the security given by a solemn contract, a formal hypothecation; and in neither case would the creditor have parted with his money, or given the credit, if he had believed that it was in the power of the debtor to deprive him of this security by any plea or claim.

It has been objected that this exemption ties up and keeps out of commerce a large amount of property. But this is a question of mere expediency, falling within the exclusive domain of the legislative department, and it can not be dealt with by the judiciary. Besides, as the debtor who has not granted a mortgage and the mortgager who has not waived have the unquestionable right to insist upon this exemption, the amount of property in commerce will not be materially increased by refusing the exemption in the comparatively few cases in which the most needy, the smallest proprietors, might be forced by the pressure of their necessities to agree in advance not to claim the benefit of the law.

The mortgager who claims the benefit of this exemption cheats the hopes and expectations of his creditor as effectually where he has not waived as where he has waived; because it is merely idle to suppose that a creditor would take or rely upon a mortgage which he knew at the time the law would not permit him to enforce. He who contracts a debt binds himself legally and morally to pay that debt. If he grants a mortgage to secure it he merely superadds the special engagement that the property mortgaged shall be applied to the payment of that debt by preference; and when he interposes a plea or a claim by which this hypothecation is defeated he violates his moral and legal obligation as completely, and inflicts precisely the same injury upon his creditor when he has not as when he has agreed formally and in advance that he will not interpose that plea or claim. The man who grants a mortgage contracts the solemn obligation that the property shall, in case of default on his part, be seized and sold in satisfaction of the debt intended to be secured; and he contracts no additional moral or legal obligation by formally stipulating that he will not do that which the mere giving of the mortgage necessarily implies that he will not do, prevent in any way the realization of the benefits which his contract professedly secures.

If we should decide that the debtor who has waived may not claim, while the debtor who has not waived may claim, the benefits of the

homestead exemption, we would virtually declare that it is in the power of the citizen to abrogate by his conventions the laws enacted in view of the public interest and public policy. The homestead exemption is not designed for the benefit of the debtor; it has in view his helpless dependents, and it intends to afford them a home and a shelter, and the means of living, of which it will not permit them to be deprived by his folly or his misfortune.

Our law-makers have not seen fit to make the homestead inalienable, nor would it be wise to attempt to do this. It may be to the interest of the family to abandon the domicile and seek a home elsewhere, and no law ought to or can impose any restriction upon this right. The power to sell for a price freely agreed upon is very different from the power to consent in advance to a forced sale. The mortgagee usually leaves a wide margin between the value of the property and the debt to be secured, and he may force a sale for cash at a most unpropitious time at two-thirds of the appraised value.

The debtor who waives the benefit of this exemption in advance occupies no worse position, morally, than if he should agree at the time of contracting a debt that he would not protect himself against its enforcement by a subsequent discharge under the bankrupt or insolvent laws. He who is driven by his necessities to mortgage the home of his wife and his children, by the mere act of granting a mortgage instead of selling the property, manifests the wish to retain it, and the hope that he may be able to save it by paying the debt. Under the pressure of his wants, deluded by his hopes and expectations, he consents to terms which he would never think of submitting to under other circumstances, and puts it in the power of the creditor to deprive him of the property for a price far below that which he might have obtained by voluntary sale. If he may, by the stipulations of the mortgage, subject to seizure and sale the property legally declared to be exempt, the whole object and policy of the law will be defeated, and the needy and helpless, the very persons designed to be protected, will be deprived of the benefits intended specially for them.

Every one who takes a mortgage understands that it is subject to the exemptions of the homestead act; and every one is held to contract with reference to the law. The exemption is absolute. Nothing in the act indicates the intention of the Legislature to make it dependent on the will of the debtor, and while the law may not deprive the citizen of the right to sell at his pleasure that which is his, it may well refuse to countenance, by giving effect to engagements in violation of its policy and prohibitions. An individual may renounce what the law has established in his favor alone, but he can not renounce that which is intended for the benefit of others and for the public good. R. C. C., articles 11, 12.

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Homeless, helpless paupers are a curse to society, and the homestead act and other exemption laws are designed to protect the public as far as possible against this grievous burden. If it is once understood that the property which the law declares to be exempt can not be sold under legal process, whether with or without a previous contract and waiver, all pecuniary engagements will be made with reference to that exemption, and credit will rest upon a more secure, because a better defined, basis. We readily accept and adapt ourselves to settled and uniform rules of property; and it is not the exemption itself, it is the uncertainty as to its meaning and extent, that impairs confidence and injures credit. Let it be understood that the exemption is absolute, and no creditor will trust to or rely upon the exempted property, or estimate it in making his contracts and engagements.

I concur in the opinion and decree pronounced by Mr. Justice Egan, but the importance of the subject warrants the separate expression of my views of the law.

DISSENTING OPINION.

MANNING, C. J. The enactment of homestead laws has been frequent of late years. The arguments in their support are specious, and attract to them popular favor. Whatever may be the reasons that induce the Legislature to enact them, our sole duty is to ascertain what is the legislative will, and when ascertained to give effect to it.

All statutes which take property out of commerce and attempt to impress upon it the character of inalienability, and all statutes which are in derogation of common right, are to be strictly construed. The general law regulating the relations of debtor and creditor is, that the property of the debtor is the common pledge of his creditors. Laws which exempt any portion of the debtor's property from the pursuit of the creditor are exceptions to the general rule, and can not be extended by implication. Thus, it has been held by this court that predial property alone and not urban is exempt to the value of two thousand dollars under the statute of 1865. Crilly's case, 25 An. 219; Hargrove vs. Flournoy, 26 An. 645.

The decisions in our sister States upon many questions arising under their homestead laws are conflicting. This is due in part to differences in the laws, and in part to the animus which pervades the judicial construction of them. An attempt has recently been made (Smyth on Homesteads) to systematize this branch of modern law, and the writer points out with accuracy the dissonant characteristics of the laws in the States, showing the variant rules that have been adopted.

We have recently held that a mortgage, executed by a debtor upon

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the only land he owned, which in quantity and value was less than that exempted by our statute, could not be enforced. *Van Wickle vs. Landry*, 29 An. 330. In that case we were strongly pressed to restrict the operation of the law to the time when the land is occupied as a homestead, and my brother Spencer approved that limitation and qualification of the debtor's right of exemption, and dissented from the opinion of the court. There was certainly ample room for difference of opinion on that question, and the same writer, to whose works allusion was just now made, informs us that that view still obtains in a few of the States, though the more recent view, he says (*Smyth*, sections 239, 240), is that expressed by a majority of the court in that case. In rendering the opinion of the court I disclosed a mental oscillation that was personal to myself upon the point involved, which was finally determined by the influence of the principle of *stare decisis*. But we are asked to go still further now. Then we held that the debtor could not be presumed to waive his legal right. Now we are required to disregard his express waiver. I can not assent to that doctrine.

The chief ground and the only tenable one on which that doctrine can rest here is the assumed public policy of the law, for there is no expression in our statute that warrants, or I would rather say compels, that construction. Now, if it be a distinct feature of public policy as shadowed forth in our homestead law that the family should be protected from the improvidence or misfortune of its head, why is this protection so partial and distinctive in its nature that it will not apply to those who live in towns, and whose families might be supposed to need the protection and to deserve the beneficence of the Legislature as well as the rural inhabitants.

May it not be true that judicial construction has enlarged the scope of these exemption laws? It has been held that a widow, who became a debtor *durante viduitate*, was entitled to the benefit of our homestead law (*Calvit vs. Hoy*, Opinion Book 43, p. 358), and I think upon good grounds, all the other requisites concurring. But it has never been held until the present case that a married woman was entitled to it, although the law of this State makes her an object of its peculiar care. The statute does indeed specify that no debtor shall be entitled to the exemption provided for in it whose wife shall own in her own right and be in the actual enjoyment of property worth more than one thousand dollars. R. S. 1870, section 1691. Does this mean, or are we to infer from it, that the wife shall be entitled to the exemption provided the husband owns nothing? The language does not bear that construction. That meaning, to my apprehension, is not even latent in it, certainly not patent upon it. And yet it is an admitted rule of construction that statutes like this can not be enlarged by implication.

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There is great force in the argument that when a person performs the deliberate act of executing a mortgage to secure a debt, that act shall be held to be a tacit but perfect waiver of all right of exemption provided by law. It has been already observed that we refused to adopt that rule; but when the debtor not only executes the mortgage, but expressly and solemnly declares that he renounces all benefits of the exemption laws, and this declaration is recited in the act, I do not think he should be permitted afterward to gainsay it under any circumstances. I do not think the law comes to his relief and says "I will help you to speak untruthfully as well as to act dishonestly, and will interpose my shield between you and him who trusted first to your honesty to pay your debt, and next to your veracity that you would not evade it under cover of a special law."

There is much to be said also in favor of that public policy which is a conspicuous feature of the laws of all countries, and which is the basis of public morals, viz.: that compulsory fidelity in the discharge of money obligations elevates the character of the citizen, and by consequence promotes the public virtue. The State that visits by the penalty of its laws the violation or disregard of pecuniary engagements with the greatest rigor is the State that has the highest standard of public honor. Wherever the law offers a premium to dishonesty by providing means of escape to the citizen from the payment of his debts, whether the mode be by exemption of property from seizure or by the equally convenient one of hiding it under cover of another's claim, there will be found the greatest laxity of the public conscience and the most shameless disregard of public and private obligations.

When, therefore, there is not an express statute conferring upon the party seeking to evade an obligation the unquestioned legal right to escape the consequences of that obligation, and he seeks to justify it upon the ground of public policy as the *motif* of the construction he invokes, it may not be improperly answered that the same considerations forbid the multiplication of those devices by which he who promises is excused from performing and he who renounces a benefit is permitted to enjoy it in spite of his renunciation.

SPENCER, J. I concur in the opinion of Mr. Chief Justice Manning.

Cooley vs. Broad.

No. 6593.

STOUGHTON COOLEY VS. H. H. BROAD ET AL.

29	345
50	8

29	345
104	134

29	345
107	712

29	345
114	624

29	345
121	156

A contract by which the owners of certain vessels unite in an association to carry passengers and freight for hire, each furnishing a certain capital to the association, and each receiving a certain proportion of the profits, constitutes the owners, as to third persons, commercial partners, and as such, liable *in solido*, for the debts of the association, no matter what restrictive clauses the contract may contain. The holder of a solidary note can not have its solidarity impaired, by the unauthorized action of his collecting agent, who receipts in favor of one of the solidary debtors on the note for "his share" of the debt.

A PPEAL from the Fifth District Court, for the parish of Orleans.
Cullom, J.

Hornor & Benedict, for plaintiff and appellee.

Fred. D. King, for defendants.

The opinion of the court was delivered by

SPENCER, J. On the twenty-sixth of June, 1875, the defendants, Broad, Dowling, Trousdale, Quatteraux, Verlander, and Powers, owning among them several steamboats running in the Opelousas trade, formed an association whereby they agreed that they would put into said association their respective boats. The objects of the association were declared to be "to co-operate together in building up and maintaining the trade, etc., known as the 'Opelousas trade,' by running their respective boats between New Orleans and Washington, Louisiana, and carrying freight and passengers between these points," * * * "to use their influence and energy to enhance the interests of all the parties to this agreement, and to prevent and discourage opposition, etc." The agreement is made for one year, under articles and stipulations as follows:

By the first, the parties agree as to the boats they are respectively to put in. By the second, they fix the relative values of their boats, and name certain of themselves as a "board of control," and define generally its powers. By the third, they provide for replacing any boat disabled or lost, and regulate such boat's participation in the profits and losses; also, fix the time and manner of each boat rendering its accounts and paying over earnings to the board of control. By the fourth, they agree to the closing of certain warehouses and the opening of others; and provide that the parties shall respectively furnish and keep their boats in good order; repairs of less than seventy-five dollars in amount to be made at the expense of the association. It is further declared that "this agreement is not a copartnership, and that none of the boats named or their substitutes or the owners thereof, shall be bound for the debts of each other, nor shall anything herein be construed as making them liable or responsible therefor." The fifth article declares who shall be captains of the several boats, and provides for their removal.

On the seventh of February, 1876, this "board of control," acting through James M. Dowling, A. P. Trousdale, and William R. Verlander, chartered from the plaintiff, Stoughton Cooley, for the use of said association (which in said act is styled the Opelousas Packet Company), the steamboat Tensas, for a period of five months, at one thousand dollars per month, payable monthly in advance. For the four deferred payments, four notes were executed, each for one thousand dollars, and payable as follows, at the Citizens' Bank: To the order of Jesse K. Bell, for five-twelfths; to the order of J. M. Dowling for four-twelfths, and to the order of W. R. Verlander for three-twelfths.

These notes were severally indorsed in blank by Bell for five-twelfths, by Dowling for four-twelfths, and by Verlander for three-twelfths. As they respectively fell due, Bell paid five-twelfths and Dowling four-twelfths thereof. Verlander made default, and three-twelfths, or two hundred and fifty dollars, of each note remains unpaid.

The payments by Bell (who it seems acted in this matter for the defendant Broad) and by Dowling were made at the bank, and were indorsed on the notes by the note clerk in words to this effect: "Received from J. M. Dowling his part, \$333 33 $\frac{1}{3}$ —four-twelfths." "Received from J. K. Bell \$416 67, his part on within note—five-twelfths."

Plaintiff now sues all the members of said association as commercial partners, and liable *in solido* for the balances due on said four notes.

Dowling and Broad answered by a general denial. Dowling subsequently filed an amended answer, alleging that he had indorsed said notes for only four-twelfths, and that he had paid that amount of each of them, and that plaintiff "had receipted for each of said sums upon the back of each of said notes in full for his part and portion of each of said notes; that he has paid all that he was bound for, and has been released from further liability."

There was judgment against the defendants *in solido*, and Broad and Dowling have appealed.

There are two questions involved:

First—Did the agreement of the twenty-sixth of June, 1875, create a commercial partnership, binding the parties thereto *in solido* for its debts? and if so—

Second—Did the receipts of the note clerk of the bank, on the back of the notes, in favor of Dowling and Bell (the latter representing Broad) for "their parts," release them from solidarity and further liability?

First—The only reason for doubting the existence of the partnership arises from the express declaration of the parties that no partnership was created by the act of association. They certainly did enter into an association, furnishing thereto specified capital, agreeing to divide profits and losses in fixed proportions, and engaging to carry freights and pas-

sengers for hire. This, under our law (O. C. C. 2796), certainly constituted a commercial partnership, and made the associates liable solidarily for debts of the association. When there exist all the conditions which, by law, create a legal relation, the effects flowing legally from such relation will follow, whether the parties foresaw and intended them or not. Thus where a man transfers to another for a sum of money, and absolutely, the ownership of a thing belonging to him, the contract between them is that of sale, and all the legal consequences of that relation will follow, even though the parties declare it not a sale, but some other contract. The fact that the parties had made stipulations between themselves as to their liability for each others' debts, or as to the proportion of their several responsibilities, can not affect third persons, even had these stipulations been within the knowledge of such third persons.

Second—The bank clerk, as such, had no authority to give release to any of the makers of said notes beyond what would result from their payments. No authority or power existed in him, except to receive payment. There is no pretense that plaintiff ever expressly authorized him to renounce any of his rights against the makers of the notes.

The judgment appealed from is affirmed with costs of both courts.

No. 5406.

IN THE MATTER OF MRS. A. L. BRASHEAR AND HER HUSBAND VS. MRS.
CHARLOTTE M. CONNER.

The institution of a suit in the capacity of heir of a decedent, or the sale by an heir of his interest as heir in a succession, amounts to the acceptance of the succession, pure and simple.

Where the heirs are all of age, and present, and represented, and have accepted the succession purely and simply, and there are no debts due by the succession, there is no necessity for the appointment of an administrator.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J.*

Race, Foster & E. T. Merrick, for plaintiff and appellant.

Hornor & Benedict, for defendant.

The opinion of the court was delivered by

ESAN, J. These appeals are by consent included in the same transcript, are between the same parties substantially, and are intimately connected as to the questions and issues involved. They were tried and submitted together in this court.

John T. Osborne died leaving considerable property and a will, which was avoided at the suit of Mrs. Conner, who sued as his daughter and heir-at-law for that purpose. She subsequently applied for administration

29	347
50	437
29	347
152	354
29	347
118	1070
29	347
125	541

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upon the estate and obtained an order of appointment and for inventory. At this stage, and before inventory, bond, letters of administration, or qualification of administratrix, Mrs. Brashear, another daughter and heir of decedent and assignee of John J. Osborne, the son and only other heir of decedent, filed a petition opposing any further steps in the administration and asking a rescission of the order of appointment on the ground that all the heirs were of age and had accepted the succession purely and simply; that there were no debts nor necessity for administration, which would only entail expense and delay upon the succession and heirs, and hinder and embarrass a partition, for which she also applied.

Mrs. Conner averred the necessity of administration "to collect from Mrs. Brashear, her co-heir, and her husband large sums of money due the estate as well as other claims and debts to pay;" she also denied "that she had accepted the succession purely and simply."

These are the substantial issues in the two cases. The heirship of the parties is both proved and admitted, and had been adjudged in the proceeding to annul the will instituted by Mrs. Conner in her quality and capacity of heir-at-law. This was an unqualified assumption of the quality of heir on her part in a judicial proceeding which amounted to a simple acceptance of the succession. R. C. C., articles 988 and 994; *Le Cune vs. Cottin*, 2 N. S. 475; *Dangerfield vs. Thurston*, 8 N. S. 242; *O'Donald vs. Lobdell*, 2 La. 299. The same may be said of the effect of the present litigation as to Mrs. Brashear, who by embarking in it accepts purely and simply, and John J. Osborne accepted purely and simply by selling his interest as heir to his sister, Mrs. Brashear (R. C. C. 1002, 994); and all the parties were of full age at the time of these acts. The record discloses no debts due by the succession or deceased, and no necessity for administration on that account. That necessity could not grow out of the indebtedness of one of the co-heirs to the other or to the succession or deceased, whether by way of collusion or otherwise, for this would be properly matter of account in the partition (C. C., article 1350); neither could such necessity arise from the indebtedness of other persons to the succession. The heirs are entitled to the same actions and exceptions as those to whom they succeed. C. P., article 23; R. C. C., article 945; 19 An. 428. They may therefore sue the debtor of the succession in the same manner as the deceased himself could have done; and if there be several heirs each may sue for his separate share in the same manner, as each is only bound for his *pro rata* share of the debts of the succession. C. P., article 113. There was really no succession to open after the proceeding to annul and set aside the will and the judgment annulling it; for as we have already seen that proceeding was instituted and conducted by Mrs. Conner in her quality of heir, and in it

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she alleged that the sole heirs are John J. Osborne, who has sold and transferred all his rights in said estate to his sister, Mrs. Brashear, who is the remaining heir, and who appeared in that proceeding as well as the present litigation, and is alleged to be in possession of the property. From that time there was no succession to administer, and the heirs who accepted purely and simply represented the deceased both as to his rights and obligations. The heir who accepts is considered as having succeeded to the deceased from the moment of his death. R. C. C., article 947. He is of full right in place of deceased, as well for his rights as his obligations. R. C. C. 945. All that remained was to partition the property between the heirs. Under such circumstances the property is vested in the heirs, and not in the succession. *Samford vs. Toadiner*, 15 An. 170; succession of Story, 3 An. 502.

Even when there are debts the heirs may stop the administration and claim the succession directly by giving security for their payment; and without administration the simple acceptance of the succession by the heirs entitles the creditors to sue them directly and recover the whole amount of their debts. R. C. C. 1423; 21 An. 278; 25 An. 56. *A fortiori*, then, may they stop administration and provoke a partition among the co-heirs at any time if, as in this case, there are no debts due from the succession. Every co-heir, whether of full age or a minor, may force his co-heirs to a partition, which it shall be the duty of the judge to decree. C. P., articles 1023, 1027.

No one can be compelled to hold property with another, unless the contrary has been agreed upon; and any one has a right to demand a division of a thing held in common by the action of partition. R. C. C., article 1289. These principles are rudimental and familiar, and we see no reason why they should not apply to the case at bar.

We think the court below erred in not giving them application and in not stopping all further proceedings for administration and decreeing partition. It was especially irregular to proceed by rule instead of by regular trial on the merits, as was done in suit 35,328—we can not give our sanction to this practice; this mode of trying the issues in a cause has often been reprobated by this court, see 3 An. 434; 8 An. 11—and still more irregular to proceed or permit further proceedings for administration pending a suspensive appeal in that case and in case 36,986, which necessarily involved the substantial issues of 35,328.

The fact that an injunction issued in the latter case without affidavit or bond was irregular, but is not material, as under the view we have taken of the case an injunction was not necessary. The proceeding for partition and in opposition to further attempt at administration should have been entertained and the previous order rescinded. The effect of this would have been all that was required.

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From the moment suspensive appeals were taken, whatever was done in contravention of them was without effect in law, and prohibition would have issued if applied for.

It is therefore ordered, adjudged, and decreed that the judgments appealed from be annulled, avoided, and reversed; that all proceedings for administration in the succession of John T. Osborne be stayed and avoided; and that the plaintiff in suit No. 36,986 of the Second District Court of New Orleans, entitled Adeline L. Brashear and her husband, Benj. F. Brashear, vs. Mrs. Charlotte M. Conner, be decreed to have and be entitled to a partition of the property and effects of the succession of John T. Osborne, deceased, in right as prayed for. It not, however, appearing how such partition can or should be made, the case is remanded to the court below to determine as to the manner of partition, whether in kind or by sale, and for such other orders as may be necessary to effect the partition.

It is further ordered that Mrs. Charlotte M. Conner pay costs of appeal and of suit \$5,328, those of partition to be borne ratably according to the respective interests.

No. 5351.

W. H. HAILE, ADMINISTRATOR, vs. MCGHEE, SNOWDEN & VIOLETT.

An administrator can not sue an alleged debtor of the succession, in disregard of his formal settlement with and discharge of the debtor, without alleging error or fraud in the settlement.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J.*

Hinton & Grover, for plaintiff and appellee.

Kennard, Howe & Prentiss, for defendants.

The opinion of the court was delivered by

EGAN, J. The plaintiff, as the administrator of the succession of R. H. Haile, who died in August, 1872, and whose succession was opened in the parish of West Feliciana, sues the defendants for the proceeds of sixty bales of cotton, and of one-third of twenty bales, which, as administrator, he consigned to the defendants for sale, during the months of October, November, and December, 1872. The proceeds of this cotton is alleged in the petition to be \$4933 25, received by defendants and not paid over.

Plaintiff alleges that the succession of R. H. Haile is insolvent, and that his duty as administrator requires him to collect the assets, and

that the defendants had no lien or privilege thereon for any claims due them from the succession.

The answer admits the receipt and sale of eighty bales of cotton as alleged, but avers that defendants made certain advances, and paid certain drafts, to enable R. H. Haile to raise the crop of cotton sold by them; that they had a privilege on the funds in their hands for the amount of their account, *and that they have accounted for, settled, and paid the amount due the plaintiff on account of the shipment of cotton.*

In support of the averment of full and complete settlement, the defendants filed in evidence the following receipt: "Received New Orleans, February 3, 1873, from McGhee, Snowden & Violet, ninety-three dollars 51-100, being in full of all transactions with estate R. H. Haile, Jr., to date. (Signed) W. B. Haile, Administrator." The plaintiff, who was a witness in the case, admits giving the receipt, and says he did not intend thereby to waive his right to demand from the defendants the proceeds of the cotton or to release them from their liability to account for and pay over the same which had been in part applied to the payment of the account of the deceased and of the succession with them. Neither the correctness of the accounts of sales of the cotton nor of the defendants' accounts are disputed.

The evidence satisfies us that the administrator knew what he was doing when the settlement was made and when the receipt was signed, and that the receipt was intended by both parties to close the accounts between them. The administrator accepted the accounts of defendants rendered and balanced in accordance with the settlement and receipt, and, so far as appears from the evidence, still retains them so closed and balanced. The good faith of the defendants in the settlement, or of the settlement itself is in no manner impugned, and it appears from the evidence that the matter of requiring the defendants to pay over the proceeds of the cotton first, and collect their debt afterward, was talked of between plaintiff and defendants in New Orleans at the time of the settlement in February, 1873, and that the administrator assured them they would hear no more of a suit for that purpose, which it appears defendants had heard was contemplated. This of itself would rebut the idea that there was error of fact on the part of the administrator in making the settlement, even had it been alleged, as it is not. The question in this case is not merely as to the right to explain or contradict a receipt for money. It is whether an administrator or any one else can be permitted to ignore a settlement with and payment to an acknowledged creditor, such as a factor or commission merchant, between whom and the succession there are cross accounts, to treat the matter as if there had been no settlement, and without either allegation or proof of error of fact or fraud to sue for an account and settlement, as though

Haile vs. McGhee, Snowden & Violett.

none had been rendered or made. We think neither good faith nor law will permit this, and that the exceptions of defendants to the mode of proceeding adopted in this case were well taken, and should have been maintained both as regards the action and the evidence. With all the advantage, however, of the reception of evidence in the court below, regardless of their objections, the only thing which the plaintiff has been able to show to impeach the settlement deliberately made by him with the defendants, is that they may have been paid by the administrator more than their *pro rata* share of the succession funds. In the case of *Sloan vs. Stevenson & May*, 24 An. 278, a case of sale of cotton by an administratrix for Confederate money, the court held that "the contract being executed the administrators would not be listened to in a court of justice when alleging their own dereliction of duty." In the succession of *Marr*, 23 An. 718, it was held that the administrator is personally responsible to the heirs of the estate if he pays the same to one not authorized to receive; and the books are full of cases in which he and his bondsmen are held responsible to creditors for over-payments to other creditors or to persons not lawful creditors. It is this apprehension which is vainly confessed by the plaintiff, and which no doubt stimulated the bringing of the present suit. If the facts be so in this case, the other creditors have the double security and remedy to pursue the administrator and his bondsmen or the preferred creditor by an action of contribution. C. C. 1088 and 1188.

Had the plaintiff not made the settlement of February, 1873, or had that settlement been attacked on account of fraud or even of fact, the case might have been very different from that presented by this record. It is well settled as a general rule, as argued by the plaintiff, that a purchaser of succession property or a debtor of the succession can not plead in compensation when sued a debt due by the deceased to himself not legally liquidated or demandable before death. It is equally well settled that the rights of creditors are fixed at the death of the debtor as to all antecedent facts and rights. These principles can not, however, be applied to the facts in this case between the parties, and can not avail the plaintiff against his own solemn and deliberate act.

It is therefore ordered, adjudged, and decreed that the judgment of the court below be annulled, avoided, and reversed, and that there be judgment in favor of the defendants, rejecting the plaintiff's demand, with costs of both courts.

No. 5373.

JUDSON FOWLER & STILLMAN VS. HENRY B. STEVENS.

39	353
47	532

One who has represented himself in his own pleadings, in a former suit, as a partner in a certain firm, is estopped from afterward denying it.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J.*

E. Rawle, for plaintiffs and appellees.

Alfred Phillips, for defendant.

The opinion of the court was delivered by

MANNING, C. J. The plaintiffs sue the defendant, as surviving partner of the commercial firm of L. W. Lyons & Co., on an account for merchandise sold and delivered. The defense is that no partnership existed between L. W. Lyons and the defendant, but the latter was merely an employee of the firm of L. W. Lyons & Co., which had but one member; i. e., Lyons.

The question of partnership *vel non*, as dependent upon and controlled by the nature and effect of the agreement, does not enter into this case. The defendant has precluded himself from denying that he was a partner by his judicial admissions and his sworn statements on record.

Lyons died in 1867, and in the same year defendant presented his petition to the Second District Court of Orleans, signed by himself, commencing thus: "The petition of Henry B. Stevens respectfully represents that, as the surviving member of the late commercial firm of L. W. Lyons & Co., he is entitled to the liquidation of the same," etc. The prayer is that he be "appointed and qualified as liquidating partner of that firm," and the order of court conforms to the prayer of the petitioner.

A year later he presents his provisional account to the court, and describes himself as the "liquidating partner of the late commercial firm of L. W. Lyons & Co." These are not mistakes of description by counsel. This petition, like the other, is signed by himself. On the trial, some months later still, wherein the homologation of the account is asked, he is a witness, and says: "I am the liquidating partner of the late firm of L. W. Lyons & Co."

These judicial admissions unalterably determine his liability in the capacity in which he is sued by the plaintiffs. His evidence to the contrary can not now be heard. He can not be permitted to impugn what he has thus solemnly and repeatedly asseverated in judicial proceedings to be true. But some of his answers on the trial of this cause impliedly and inferentially admit the partnership. Thus, replying to the question if any of the creditors of the firm ever knew him as a partner, he says: "No, I don't think any of the creditors knew that I was in the concern

until after his (Lyons's) death." And the agreement of Lyons and Stevens, which the latter introduces in evidence to show that there was no partnership between them, stipulates that Stevens shall not "indorse any paper or go security for any one in his own name or that of the firm." There can be no doubt of the defendant's liability, and so thought the lower court. A remittitur of interest by reducing the rate has been voluntarily made by plaintiffs.

It is therefore ordered, adjudged, and decreed that the judgment of the court *a qua* be amended so as to reduce the rate of interest from seven to five per centum per annum, and, as thus amended, it is affirmed with costs.

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47 654
47 1230

No. 6375.

THE STATE VS. BUTLER JACKSON ET AL.

The declarations, and confessions of a co-conspirator, made after the accomplishment or the abandonment of the common enterprise, will not be received in evidence against another co-conspirator.

A PPEAL from the Sixth Judicial District Court, parish of Livingston.
Kemp, J. Trial by jury.

H. R. Steele, Attorney General, for the State.

C. J. Bradley, for defendants.

The opinion of the court was delivered by

SPENCER, J. The defendant, Israel, is appellant from judgment and sentence for twelve months at hard labor for stealing a cow.

The only question presented is whether the declarations and confessions of a co-conspirator, made after the accomplishment or abandonment of the common enterprise, can be offered and proved against another co-conspirator? If not, the verdict and judgment in this case must be set aside. Wharton lays down the rule as follows:

"The distinction appears to be well settled between the admissibility of declarations accompanying the act of the conspirators, and statements subsequently made as evidence against the rest." Wharton's Am. Crim. Law, section 705.

"This co-responsibility holds good without regard to the time in which the party entered the combination. He becomes subsequently responsible for every act which may afterward be done by any one of the others in furtherance of such common design." * * * "When, however, the common enterprise is at an end, whether by accomplishment or abandonment, no one of the conspirators is permitted by any subsequent act or declaration of his own to affect the others. His confession, therefore, subsequently made, even though by the plea of guilty, is not admissible

State vs. Butler.

in evidence as such against any but himself. Under no circumstances can the most solemn admission made by him on trial be evidence against his accomplices." *Ibid*, section 703.

It is therefore ordered and decreed that the verdict of the jury and judgment of the court thereon, as against the defendant, Israel, be annulled, avoided, and set aside, and this case is remanded to be proceeded with according to law.

No. 6633.

NEW ORLEANS NATIONAL BANK, MRS. A. B. BARANCO, SUBROGEE, vs. JOSEPH RAYMOND.

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52 1564

29 355
d120 1031

No petitory action, or action to annul, can be instituted by rule.

A party can not impeach the title of his transferror.

All buildings put on mortgaged real estate by the owner, are immovable, and become subject to the mortgage on the real estate.

A mortgage creditor can not be prejudiced by any contract made by his debtor, to which he is not a party.

The revenues of a property, which belong to the owner of the property, can not be seized, and sold separately from the property.

Any party in interest may proceed by rule to remove any thing which illegally clouds a title.

A bank organized under the national banking act may sell any immovable it owns, and reserve a mortgage, and vendor's privilege on it.

A PPEAL from the Fifth District Court, parish of Orleans. *Cullom, J.*

Charles Louque and Carleton Hunt, for Joseph Billgery, plaintiff in rule and appellee.

McGloin & Nixon and Magruder & Richardson, for Mrs. A. B. Baranco, appellant.

The opinion of the court was delivered by

SPENCER, J. The Union National Bank of New Orleans sold to Joseph Raymond by authentic act of date the twenty-seventh of February, 1873, a certain parcel of ground in the square bounded by First, Second, Dryades, and Baronne streets, for the price of \$14,666 66, one-fifth of which was paid in cash, and for the balance Raymond executed notes at one, two, three, and four years, secured by special mortgage and pact of *non alienando* on the property.

On the tenth of April, 1873, Raymond entered into a contract with the city of New Orleans, acting through its mayor under ordinance No. 2041 administration series. By that contract Raymond bound and obligated himself in substance to erect on said grounds a market-house according to certain specifications; to free the property of all mortgages and incumbrances on or before the completion of said building, and to keep

the market as required by the city ordinances, etc. Raymond during the first ten years was to receive all the rents and revenues. At the expiration of the first ten years the city was for the next ten years to farm out the market and take all the rents and revenues in excess of five hundred dollars per month, or six thousand dollars per year; the rents up to said amounts to be paid to Raymond, his heirs, or assigns. At the end of this second term of ten years, Raymond was to transfer the grounds and market in full ownership to the city, binding himself not to alienate or incumber the same to the prejudice of this agreement.

On the tenth of March, 1874, the New Orleans National Bank obtained judgment on a bill of exchange for seven hundred dollars against Joseph Raymond, issued execution thereon, seized, and, on the twenty-fourth of July, 1876, sold and purchased for one hundred and fifty dollars "all the right, title, and interest of Joseph Raymond in, to, and under the contract made with the city of New Orleans of date April 10, 1873." * * * "The said act of April 10, 1873, conferring upon him the right to the revenues of a market constructed by him at the corner of Second and Dryades streets, in the square bounded by Second, First, Dryades and Baronne streets, for the term of twenty years," etc.

On the fifth of September, 1876, said New Orleans National Bank sold and transferred, in consideration of the amount due it, with subrogation, to Mrs. Baranco, all its rights in, to, and under said judgment and purchase.

On the twenty-fourth of May, 1876, the Union National Bank, under executory process against Raymond upon said vendor's mortgage, seized the above-described lots of ground, "together with all the buildings and improvements thereon," and advertised the same for sale on the first of July, 1876.

On June 29, 1876, Joseph Billgery purchased and was subrogated to the judgment in the case of "Andrew G. Downey vs. Joseph Raymond," for some twelve hundred and fifty dollars, being for work done on said market buildings.

On the first of July, 1876, the day of sale, Joseph Billgery paid to the Union National Bank the mortgage note due, and the sale was not made. Subsequently he took up and paid the remaining outstanding vendor's note held by the Union Bank. Billgery did not take a formal act of subrogation at the time of his payment on the first of July, but on the second of August, 1876, the bank gave him a receipt and subrogation to its rights.

Billgery, as subrogee of Union National Bank, caused said property to be re-advertised for sale on February 10, 1877, and re-advertised again for sale on March 3, 1877.

On the twenty-fourth of February, 1877, he commenced the proceed-

New Orleans National Bank vs. Raymond.

ing now before us, being a rule taken on Mrs. Baranco to show cause why the act of adjudication by the sheriff to the New Orleans National Bank above described (to which she had been subrogated) should not be erased and canceled from the books of the office of conveyances, for the reason that the same is null and void and operates injuriously to him (Billgery) as a cloud upon the title of said property.

Mrs. Baranco pleads by way of exception and answer in substance as follows:

First—That plaintiff in rule, not being a party to the suit of the New Orleans National Bank vs. Joseph Raymond, can not proceed in this summary manner to set aside the adjudication, and should proceed by direct action.

Second—That the pretended mortgage to the Union National Bank is void, as taken in contravention of the laws of the United States creating national banks; that said bank under said laws is prohibited from owning real estate and from taking or holding mortgages thereon under the circumstances of this case.

Third—That the mortgage to the Union National Bank has been extinguished by payment, and that said Billgery was not subrogated thereto.

Fourth—She alleges her ownership of the rights of Raymond under the said contract with the city, and that she is entitled thereby to the rents and revenues of said market in the hands of the sheriff.

Fifth—By way of reconvention she prays and demands the nullity of Billgery's pretended mortgage rights and for their cancellation, and that she be declared entitled to the revenues of said market.

Upon these issues the case was tried. There was judgment for plaintiff ordering the erasure and cancellation of Mrs. Baranco's title, and decreeing its nullity. She prosecutes this appeal.

The first question naturally presenting itself is whether or not the plaintiff, Billgery, has the right to proceed by rule and in a summary manner as he has done. This depends upon the nature of Mrs. Baranco's rights. Plaintiff can not bring a petitory action by rule, nor can he institute an action of nullity in that manner. Her counsel insists truthfully that she did not buy the market property itself, but only Raymond's rights under the contract with the city to take its revenues. He asserts that under said contract with the city the market building, though put by Raymond at his own proper expense upon the ground bought by him from the bank, did not constitute a part of the realty, but was a *mere movable*, and not subject to the bank's vendor's mortgage. He further argues that under the said contract with the city the property was inalienable, and therefore, even if the building was *immovable*, it was not mortgageable.

These propositions are, upon purely elementary principles, utterly untenable. The bank was admittedly owner of the lots. Both parties claiming under the bank, neither can or does dispute its title. The bank sold these lots to Raymond. Raymond became the owner. Raymond, the owner, at his own proper cost, put a building on these lots. The building thereby became immovable by accession and a part of the soil. Raymond therefore owned the soil with the building on it. The bank had its mortgage (if any existed) upon the soil and the building as its accessory. O. C. C. 455, 496, 497, 498.

These consequences and principles flow from the laws of the State, which are paramount and must govern. The contract between Raymond and the city could not affect the legal rights of the bank. It would be strange, indeed, if a vendee, owing part of the price, could deprive his vendor of recourse upon the property sold, by entering into a contract with a third person declaring the property inalienable, or by agreeing to put buildings on it which he stipulates shall not be subject to the vendor's claim, or by promising to transfer the land and buildings to such third person at a future day.

We have seen that Raymond owned the land and the building, and that both were subject to the bank's mortgage, the land and building being in reality but one piece of real estate. Raymond's interest in and to the future revenues of this property could not be sold distinctly and separately from the property itself. He did not derive his right to its revenues from the city, but from his ownership. His contract with the city *put restrictions* upon *his rights*, but did not create them. But it is manifest that no agreement between Raymond and the city could affect the rights of the bank.

We regard the seizure and sale of Raymond's interest in the future revenues of a property of which *he was owner* as utterly null and void; for where the rights of ownership and enjoyment are vested in one and the same person they constitute a unity, a single thing, and can not be seized and sold separately. They must be seized together, or not at all.

We conclude, therefore, that the rights so-called of Mrs. Baranco are mere appearances without substance, and as the inscription of her deed is calculated to injure the rights of persons claiming or owning said property, any party showing an interest may proceed summarily to have the cloud removed. See 2 An. 650.

It therefore only remains for us to inquire whether Joseph Billgery shows an interest in having this done.

He claims to be subrogee of the vendor's mortgage held by the Union National Bank. If that be a valid mortgage and he be the holder of it, his demand is well founded.

Counsel for defendant in the rule urges strenuously that the mortgage

New Orleans National Bank vs. Raymond.

in favor of the bank was in its inception null and void, as violative of the national bank act. He admits that the bank was the owner of the lots in question, but contends that it could not sell them on a credit, reserving a mortgage and privilege for the price, and that such mortgage and privilege were absolutely void. The twenty-eighth section provides as follows:

"And be it further enacted, That it shall be lawful for any such association to purchase, hold, and convey real estate as follows:

"First—Such as shall be necessary for its immediate accommodation in the transaction of its business.

"Second—Such as shall be mortgaged to it in good faith for debts previously contracted.

"Third—Such as it shall purchase at sales under judgments or decrees or mortgages held by such association, or shall purchase to secure debts due to said association.

"Such association shall not purchase or hold real estate in any other case or for any other purpose than as specified in this section," etc.

As stated, there is no dispute as to the bank having been owner of the lots, and therefore it must have acquired in some one of the modes specified in the act. The act gives authority to *purchase* under certain *restrictions*, but there is no restriction upon the power "to convey." The intent and policy of the law is manifest. It was to discourage, to prevent, the accumulation of real estate in the hands of these banks. But if such was the intent, it would be strange if the power and right "to convey," to sell, were restricted. We would expect the largest liberty in this direction, as being in furtherance of purposes of the lawgiver. It is unreasonable to conclude that because the law gives the power to do business "by loaning money on personal security," and restricts the right to purchase real estate, that therefore it forbids the sale of such real estate as may have been lawfully acquired upon the usual and customary terms of the commercial world, and strikes with nullity such vendors' liens and mortgages as may be retained to secure deferred parts of the price. If defendant's theory be right, then a national bank in Louisiana can not sell real estate on a credit at all, even without mortgage, for under our law the vendor has for his security, by mere operation of law, both his lien and the right of resolution of the sale, which would constitute *real* securities for debt in violation of the banking act. We conclude therefore that there is nothing in the law preventing a national bank from selling its real estate on terms of credit and reserving a mortgage to secure the price.

The remaining question is, was Billgery subrogated to the bank's mortgage? It is unnecessary to discuss the effect of the receipt and conventional subrogation given to him by the bank on the second of

August, 1876. He was a creditor of Raymond on the twenty-ninth of June, 1876, by subrogation to the judgment of Andrew G. Downey. He paid the mortgage note to the bank on the first of July, 1876. Subrogation took place by effect of law. C. C. (old) 2157.

There is no proof that Billgery acted as Raymond's agent; that is satisfactory. It is conceded on all sides that it was Billgery's money that was paid, and the weight of evidence is largely in favor of his having done so in his own interest and behalf.

It is therefore ordered, adjudged, and decreed by the court that the judgment appealed from be affirmed with costs of both courts.

No. 6468.

STATE OF LOUISIANA EX REL. F. COMMINGE ET AL. VS. THE JUDGE OF THE
SUPERIOR DISTRICT COURT.

The release of an injunction by bond, is a matter confided to the discretion of the lower court.

The exception of *lis pendens* will not be considered in this court, unless raised in, and passed on by the court *a qua*.

The writ of prohibition will not issue to restrain an inferior judge from doing any act, when he has, *prima facie*, jurisdiction.

A PPEAL from the Superior District Court, parish of Orleans. *Lynch, J.*

Charles S. Rice, for relators.

The opinion of the court was delivered by

DEBLANC, J. The plaintiffs in this case are the keepers of private markets; the defendants, except the judge, the keepers of public markets in the city of New Orleans. In 1874 the relators enjoined the then Administrator of Commerce, Superintendent of the Metropolitan Police, and other officers and persons from closing their respective establishments. Their injunction was tried and dissolved, and from the decree rendered against them they obtained a suspensive appeal.

After the dissolution of plaintiff's injunction, and with a view, they allege, of evading, escaping, and annulling the effect of the appeal taken by them, the defendants, except the judge, brought suits against them, enjoining them from carrying on their private markets, and relators were repeatedly refused by the judge of the Superior District Court the privilege of bonding defendants' injunction, which, they charge, invades the jurisdiction of this court.

On the twenty-eighth of November, 1876, the relators applied for writs of prohibition against the judge of the Superior District Court, restrain-

29	360
50	138
51	144
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117	540
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124	377

ing said judge from exercising any further jurisdiction in the injunction suits filed by defendants, and enjoining the latter from interfering with relators in regard to the private markets opened by them in this city.

Has the judge of the lower court exceeded the bounds of his jurisdiction?

Is the remedy applied for necessary for the preservation of the parties' rights and the constitutional exercise of our appellate jurisdiction?

To obtain the injunction complained of, defendants alleged that they are the owners of public markets in this city; that under the law no private markets can be opened within twelve squares of those they own; that, in violation of said law, the relators are carrying on a private market within the prohibited limit, and, by that unlawful act, have caused them damages in the sum of one thousand dollars.

So far as we are informed by the pleadings and documents submitted to our consideration, the only step taken by the relators in the suits of defendants against them, was their effort to dissolve the injunction by furnishing bond. It was within the legal discretion of the district judge to grant or refuse that application.

The exception of *lis pendens*, suggested by plaintiff, has not been urged in and passed upon by the lower court, and, to decide it, we would have to invade the inferior jurisdiction, or draw to our own, by a nameless process, the suggested exception.

The lower court, in this instance, was proceeding in a matter over which it possesses a legitimate and indisputable jurisdiction. It could not, justly, have refused the injunction granted to defendants.

"Since the object of the writ is to prevent an inferior court from proceeding beyond its jurisdiction, where the return to the writ shows a *prima facie* case of jurisdiction, the prohibition should not be perpetuated." High., p. 566, No. 780.

"The writ will not go, when the very question of fact on which it depends is denied, and is the chief point in the litigation yet pending, and undetermined in the court below, as it would virtually be a trial of the case by the Supreme Court upon its merits and before the appeal." High., p. 572, No. 78P.

In the case of D'Meza against the judge of the Fourth District Court, for the parish of Orleans, Mr. Justice Howe in his decision reviewed and condensed our jurisprudence on this important question. He quoted from the nineteenth L. R. a clear and correct opinion, which has been and remains a safe guide to the bench and the bar; it reads as follows: "The writ of prohibition, the power to grant which is specially allowed by the Code of Practice to appellate courts of competent jurisdiction, is not a writ of right; it is within the sound discretion of the tribunal to which the application is made; and the party who resorts to it is bound

State ex rel. Comminge vs. Judge of the Superior District Court.

to establish such facts as to convince the appellate court that the remedy applied for is necessary, not only for the protection of the legal rights of that party, but also, and principally, for the constitutional exercise of our appellate jurisdiction. We, therefore, understand that the authority thus granted, being considered in relation to the constitution, which allows this court appellate jurisdiction only, is to be confined to matters which have a tendency to aid that jurisdiction." 21 An. 123; 26 An. 146.

The Superior District Court no longer exists. Before it was abolished, it was competent to decide the suits of defendants against plaintiffs. In taking cognizance of those suits, the judge of that court did not exceed the bounds of his jurisdiction. He fulfilled his duty. C. P., articles 845, 846.

It is therefore ordered that the application filed by plaintiffs on the twenty-eighth of November, 1876, be and it is hereby discharged at their costs.

No. 6500.

CHARLES MARIN vs. WIDOW J. THIERRY.

Service of a rule to dissolve an injunction, at the office of plaintiff, on some other occupant of the office, is not a legal service.

The appearance of a party merely to take an appeal, does not cure any defect in the service of citation on him.

A PPEAL from the Fifth District Court, parish of Orleans. *Cullom, J.*

Charles Louque, for plaintiff and appellant.

Julien Michel, for defendant.

The opinion of the court was delivered by

SPENCER, J. Plaintiff took out an injunction against executory process of defendant.

Defendant took a rule on plaintiff to show cause why the injunction should not be set aside. Notice of this rule was "served on Charles Marin, defendant therein, by leaving the same at his office, No. 56 Exchange Alley, in the hands of John T. Dufour, same office, the said Charles Marin being absent at the time of said service."

Charles Louque was the plaintiff's attorney of record.

On the sixth of June, 1876, plaintiff and his attorney being absent, the rule was taken up, tried, and injunction dissolved with costs.

Plaintiff prosecutes this appeal. The service of the rule to dissolve was bad. It was made neither on the plaintiff in person, nor at his domicile, nor on his attorney.

The subsequent appearance of plaintiff to ask for an appeal can not

29	362
50	644
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111	94
29	362
117	943

Marin vs. Widow J. Thierry.

be construed into a waiver of his right to notice of the rule to dissolve his injunction.

It is therefore ordered, adjudged, and decreed that the judgment dissolving plaintiff's injunction appealed from be avoided and reversed, and that this case be remanded to the court *a qua*, to be proceeded with according to law, defendant and appellee paying costs of appeal.

No. 6444.

MRS. MARIE E. DAWSON VS. MARIE LANDREAUX ET AL.

The admission of the alleged agent that he is authorized to represent a third person in a suit, does not prove the agency.

The authority to represent a defendant in a suit must be shown expressly, or by irrefutable implication.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J.*

Thomas W. Collens, for plaintiff and appellant.

C. E. Schmidt, for defendants.

The opinion of the court was delivered by

DEBLANC, J. Defendants, it is alleged, are the legal representatives of one Pierre Landreaux, who in 1835 was the recorder of mortgages for the parish of Orleans. They were, at the date of the institution of this suit, residents of the city of Paris, and represented here by A. Rochereau & Co., who were cited in this case as their agents and attorneys.

Plaintiff seeks to recover from them the sum of \$6762 25 on the ground that forty-two years ago the said Pierre Landreaux, defendants' ancestor, failed, through error, ignorance, and in violation of his official duty as recorder, to inscribe her marriage contract in the book of mortgages, which he then kept, and by said failure her rights against her husband, amounting to the amount she claims, were outranked by the rights of subsequent creditors, and completely lost in 1874, as shown by a decree of this court reported at page 534 of the twenty-sixth Annual.

Defendants' pretended agents appeared in the lower court, and, reserving all legal exceptions to plaintiff's petition, denied all and singular the allegations therein contained, and in bar of her demand pleaded the prescriptions of one, three, five, ten, twenty, and thirty years.

Under the general issue, an agent is bound to establish his authority; and, assuredly, those who assert and rely on that authority, whether it be denied or not denied by the supposed agent, must prove what they assert. The naked admission of the agency is not of itself sufficient to bring in court those he assumes to represent. If it were, the rights of

Mrs. Marie E. Dawson vs. Marie Landreaux.

non-residents could too easily be sacrificed by concocted and fraudulent admissions. *Lanata vs. Macera*, 20 An. 426.

Were we in this instance to arbitrarily presume the existence of the pretended mandate, we would have to as arbitrarily presume its nature and extent, whether it delegates mere power of administration, or specified and more important powers. The authority to represent a party in the defense of an action against that party can result but from express terms or from implication so clear as to be irresistible. 9 L. R. 78; 10 L. 598; 4 An. 61, 133; 5 An. 218; 6 An. 562, 651: 17 L. R. 42; 20 An. 426.

In this case, those sued and cited as the agents of defendants have denied the supposed agency, and if it did and does exist that fact has not been established, and, legally, defendants are not in court. Under these circumstances, the judgment should have been one of nonsuit.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be and it is hereby amended, and plaintiff's demand dismissed as in case of nonsuit, at her costs in both courts.

It is further ordered that, as amended, said judgment is affirmed.

No. 6501.

STATE OF LOUISIANA VS. MOLLIE ROBINSON ET AL.

When the facts, as charged in the indictment, constitute the crime of robbery, the mere omission of the word "rob," will not invalidate the indictment. The absence of a witness is no ground for a continuance, unless the party asking the continuance shall make affidavit that he expects to procure the absent witness, and that the facts to be proved by such witness, can not be proved by any other one, known to affiant.

The judge *a quo* may make any ruling as to the manner of conducting a trial, in order to secure a prompt decision, which is not prohibited by law, and which works no prejudice to the accused.

A PPEAL from the Superior Criminal Court, parish of Orleans. *Shaw, J.*

H. R. Steele, Attorney General, for the State.

Brown & Dalton, for defendants.

The opinion of the court was delivered by

SPENCER, J. Defendants, Mollie Robinson and Maria Davis, were, on information, tried and convicted of robbery. The information charges that they, "with force and arms, etc., in and upon one F. E. Long, in the peace of the State then and there being, did make an assault and him the said F. E. Long in bodily fear and danger of his life then and there feloniously did put, and money in paper, currency, etc., to the amount and of the value of \$618, of the goods, chattels, and property of the said F. E. Long, from the person and against the will of the said F. E. Long,

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47	1591
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104	45

State vs. Mollie Robinson.

then and there feloniously and violently did seize, take, and carry away," etc.

A motion in arrest of judgment was made on the ground that the charge in the information did not amount to a crime under the laws of Louisiana. And the same ground is assigned in this court as error apparent on the face of the record. The counsel urges that the accused are not charged with "robbing," but with "seizing" the property of F. E. Long.

The charge is in substance that they did make an assault upon, and put in bodily fear and danger of his life, one F. E. Long, and then and there feloniously and violently did seize, take, and carry away from his person and against his will \$618. These facts charged constitute robbery, and the failure to use or the omission of the word "rob" is immaterial.

The affidavit for continuance was insufficient in two respects—

First—It does not state that there was any expectation of being able to procure the absent witness; and,

Second—It does not aver that the facts sought to be proved by him could not be proved by other witnesses known to the accused, but merely that "deponents can not prove the facts by any other witness summoned here to-day on their behalf."

It further appears that while counsel for defendants were examining a juror on his *voir dire*, as to his knowledge of the case at bar, the judge becoming impatient at having "the information read over many times in slow tones" as each juror was examined, directed its discontinuance as an unnecessary consumption of time. It appears, moreover, that the juror in question was challenged and set aside for cause.

Courts are established to try causes, and of necessity must have some discretion and control in the manner of conducting them. Of course, every reasonable opportunity should be accorded the accused to make good his defense, but it must be borne in mind that while the accused has rights, the State has them also. As a general rule, the judge should interfere as little as possible with the methods of the counsel engaged in conducting a cause; but it is manifest that cases might arise when it would be the duty of the judge to force the parties to proceed more expeditiously, as where it is manifest that the effort is to prevent, instead of to facilitate, a trial. We have no reason to believe the accused in this case suffered any prejudice from the action of the court.

The counsel, in their brief, call the attention of the court to a statement made in their motion for a new trial, to the effect that the jury returned into court and asked further instructions, which were given; that counsel then asked the judge to further instruct them, which he refused to do. It suffices to say that such a statement in a motion for new trial can not

State vs. Mollie Robinson.

be noticed by this court. A bill of exceptions should have been taken showing the facts and the judge's refusal.

We see no reason to disturb the verdict of the jury and the sentence of the court.

It is therefore ordered, adjudged, and decreed that the verdict and judgment appealed from be affirmed with costs.

No. 6622.

SUCCESSION OF FRANÇOIS LACROIX.

An account filed by an administrator, which contains no list, or classification, of creditors, and no statement of the debts of the succession, but a mere marshaling of the proceeds of one asset, and the recognition of but one creditor of the succession, can not be the basis of a valid judgment. Any creditor of the succession, having an interest in the proceeds disposed of by the decree homologating such an account, may appeal from the decree.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J.*

S. P. Blanc and H. G. Morgan, for city of New Orleans, appellant.

W. O. Denégre, for administrator.

Louque & Fernandez, for J. Billgery.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

DEBLANC, J. The city of New Orleans, through its proper officer, has appealed from a judgment homologating what purports to be "the first provisional account," filed by the administrator of the aforesaid succession.

We are asked to dismiss said appeal on the grounds:

First—That the city is without interest in this matter.

Second—That, as a sale was made of the property belonging to said succession, the presumption is that the taxes bearing thereon have been paid.

Third—That it is not shown that the taxes claimed by the city were recorded before Billgery's mortgage.

The grounds relied upon are untenable; the city's denied interest is asseverated in the mayor's affidavit, and fully established by appellee's evidence. In the act of mortgage from Lacroix to Billgery, there is a declaration that Lacroix was then indebted to the city for the taxes of 1871, 1873, 1874, and, besides, for a judgment of \$10,563 45. These claims appear to be secured by privilege and mortgage prior in rank to Billgery's mortgage.

We can not presume that these claims have been paid, as the administrator of said succession has applied to the Second District Court to be

Succession of Lacroix.

authorized to sell the property thereto belonging, and for the express purpose of paying those claims, and that of Billgery.

The motion to dismiss the appeal is overruled.

ON THE MERITS.

The opinion of the court was delivered by

DEBLANC, J. On the first of February, 1877, E. T. Parker, public administrator, administering the succession of François Lacroix, filed a petition praying for the publication, approval, and homologation of his provisional tableau which he annexed thereto. The tableau is as follows :

"First Provisional Account—Filed February 1, 1877—Succession of François Lacroix, in account with E. T. Parker, public administrator, and acting administrator of the succession. Provisional tableau of distribution in pursuance of an order of the Honorable the Second District Court for the parish of Orleans, and relating to the mortgage claim of Joseph Billgery only:

"ASSETS.

"By proceeds of sale of the real estate designated in the advertisement of sale of the seventh July, 1876, as Nos. 8 and 9. No. 8 realized (one-third cash, the balance on one and two years,) \$2410; No. 9 (on same terms) \$675, which sums have already been received by the administrator.

"On the twenty-second and twenty-third January, 1877, there were sold, in pursuance of an order of the honorable court, the several parcels of real estate set forth in the annexed statement marked Exhibit 'A.'

"The price of adjudication amounts to the sum of \$15,540, which is being received by the administrator as the acts of sale are passed and the titles made.

"Special liability proposed to be paid out of the proceeds of sale set forth on the reverse hereof.

"Name of creditor—J. Billgery, by special mortgage of date the first of July, 1875, by act passed before Jules Mossy, Esq., notary, signed by the decedent, F. Lacroix—Amount of claim \$5500, to be paid by privilege and mortgage out of the proceeds of real estate set forth on the reverse hereof, the fees of his counsel five per cent thereon, and interest at eight per cent per annum, from the first of May, 1876, and costs of clerk of the Fifth District Court—\$11 55, and \$4 sheriff's fees.

"(Signed)

E. T. PARKER, Administrator.

"NOTE.—The several parcels of real estate described on the reverse hereof were seized on executory process, issued by Joseph Billgery in

June, 1876, to enforce the payment of the note above described, interest, attorney's fees, and costs of court.

"By consent of the parties interested, and with the very reasonable expectation that the several parcels of real estate upon which Billgery had a mortgage would realize a larger sum if sold at administrator's sale, and partly for cash and partly on terms of credit, the real estate above described was sold by Placide J. Spear, auctioneer, and with the result as shown in the exhibit.

"(Signed)

E. T. PARKER, Administrator."

This document, though styled a provisional account, was on the seventeenth of February, 1877, homologated as the final account of E. T. Parker, as administrator of the succession of François Lacroix, and the administrator ordered to distribute the funds of said succession in accordance therewith.

From this decree of homologation the city has appealed. That decree does not conform to either the pleadings, the evidence, or the law.

The document styled "a provisional account" is not in law or in fact, in form or substance, the account due and to be rendered by an administrator. It is, at most, the acknowledgment of one of the debts of the succession, and a statement of the intended payment of that debt. To lessen litigation, we treat it as such.

The city, it is said, has not opposed the account, and can not complain of its homologation. We think otherwise. The paper filed as an account could not be made the basis of a judgment. It mentions none of the privileged claims inseparable from the settlement of a succession, the existence of which we are bound to presume. It ignores the claim of the city for over ten thousand dollars, acknowledged by the administrator, and to pay which he provoked the sale of the property—a claim shown to be, in date and in rank, prior to Billgery's mortgage.

It may be that no expenses were incurred for the last illness, the coffin, the funeral, and the grave; but there are law charges, which can not be denied. Were they paid, are they due? If paid, or to be paid, out of what fund? How, when, and by whom have they been or shall they be satisfied? Is the succession solvent or insolvent? If solvent, what is the amount of its assets, and of those assets what has been or may be realized? If insolvent, what are its liabilities, the extent and character of its liabilities? What proportions shall be paid to the creditors? In the account presented there is no list, no classification of debts, no proposed distribution of funds between said creditors.

It is manifest that the judgment which homologates said account may work an irreparable injury to the city, and against the effects of that judgment the city could protect its interest either by an action of nullity or by appeal. That judgment, though erroneous, does exist, may be

Succession of Lacroix.

complied with or executed. As an account, the paper filed by the administrator has no legal existence. It does not even allow a credit of five hundred dollars paid by the administrator to Billgery on the thirtieth of August, 1876. It is not merely irregular and incorrect; it is absolutely incomplete.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be and it is hereby annulled, avoided, and reversed at costs of appellee.

It is further ordered that the rights of the parties to this suit are specially reserved.

No. 5407.

THE WORKINGMEN'S ACCOMMODATION BANK VS. GEORGE T. CONVERSE ET AL.

An association of persons can not claim a corporate existence under the free banking act, unless they shall have fulfilled the conditions precedent prescribed by that act.

No corporation organized under the general incorporation act is permitted to engage in the banking business.

No association of persons can appear in court as a corporation, unless organized as such, in strict accordance with law. Unless so organized it can only sue in the individual names of its members.

APPEAL from the Fifth District Court, for the parish of Orleans.
A. Cullom, J.

Hornor & Benedict, for plaintiff and appellant.

Hays & New, for defendants.

The opinion of the court was delivered by

MANNING, C. J. The plaintiff sues as a corporation established under the act of the General Assembly of this State of 1855 (Revised Statutes of 1870, sections 275 *et seq.*) authorizing free banking, and seeks to recover over eleven thousand dollars from George T. Converse and the sureties on his bond, given for the faithful performance of his duties as book-keeper and paying teller of plaintiff, which sum, it is alleged, Converse has applied to his own use.

Sundry exceptions were pleaded by the defendants, viz.: that the free banking act, under which plaintiff claims to be organized, does not provide for an association of individuals for the purpose of private banking, but only for the creation of public banks of circulation, controlled by the Auditor and Treasurer of the State, and that the organization of plaintiff was not made under that act, and could not be, but was made under another act providing generally how corporations can be created, which latter expressly prohibits such corporations from engaging in banking business of any kind. *Ibid*, section 677 *et seq.*

39	369
46	1124
29	369
47	1081
29	369
114	741

That the free banking act imposes certain essential conditions upon those who seek to form a corporation under it, and that plaintiff has not complied with those enumerated, which are, that there must be mention and description of a corporate seal, and plaintiff's articles of association omit it; that the existence of free banks is limited by that law to twenty years, and plaintiff's articles provide for twenty-five years duration; that these articles do not specify the numbers of shares held by each stockholder, which that law requires; that these articles were not deposited in the office of the Auditor, nor in that of the recorder of mortgages, and neither of these requirements can be dispensed with.

That the act under which plaintiff claims to derive its existence was inoperative at the time of its creation, because suspended by the act of Congress which authorized the issue of United States notes, and that neither at the date of its creation, nor at any other time, did plaintiff have any corporate existence, and therefore it could not, as a corporation, enter into a contract, or bind others by a contract.

There are other exceptions which cover all the distinctive features of the act, but it is not necessary to specify them further.

There can be no doubt that the plaintiff has mistaken its paternity. If it derives its existence from the free banking law, then it has not complied with the conditions which that law prescribes as essential to its vitality as a corporation, and those conditions are precedent. It does not begin to live until they are fulfilled. If it derives its existence from the general incorporation act, then it is without the power to engage in banking business, and it was while engaged in that business that it made the contract for the violation of which a judgment is now demanded against the defendants. It is impaled on either horn of the dilemma.

The plaintiff meets these objections with the rejoinder that the defendant, George Converse, accepted the position of paying teller from it, and is, therefore, precluded from denying its corporate capacity under the free banking law, and the other defendants became his sureties to a bond for the faithful discharge of his duties, and it does not lie in their mouths to dispute or deny an authority which they admitted to exist by signing the bond. But here the law interposes its inexorable mandate. Corporations unauthorized by law, or by an act of the Legislature, enjoy no public character, and can not appear in a court of justice, except in the individual names of all the members who compose them, and not as political bodies, although these corporations may acquire and possess estates and have common interests as well as other private societies. Civil Code, article 437, new No. 446.

The plaintiff can not, therefore, sue as a political body. It can not appear in a court of justice, except in the individual names of all the members who compose it. It has sued by a name and in a manner which it is not

Workingmen's Accommodation Bank vs. Converse.

empowered to do, and it has not sued in the names and manner in which it is empowered to do. It follows that the exceptions were well taken to the present action, but its right to institute another suit, such as the law does authorize, should be reserved. The lower court so ruled, and therefore

It is ordered, adjudged, and decreed that the judgment of the lower court is affirmed with costs.

DISSENTING OPINION.

EGAN, J. I dissent from the conclusions of the court in this case. I can not consider the article of the Civil Code which provides that corporations not authorized by law can not appear in court as a prohibitory law to the extent claimed for it. Nor can I give my consent to permit one who had dealt with the plaintiff as a corporation and given a bond for the faithful performance of his duties as an officer of the corporation, and thus recognized its existence, to shelter himself under such plea from just responsibility incurred as such officer by reason of his own default and unfaithfulness. He and his sureties are estopped from denying the existence of the corporation, as such, as much as would have been the corporators themselves when sued as such. Such I understand to be the doctrine not only of the United States courts, but of our own, which have frequently held that one dealing with a corporation thereby admits its existence as such, and that no other evidence is required.

ON APPLICATION FOR REHEARING.

The opinion of the court was delivered by

MANNING, C. J. The plaintiff calls our attention to a decision of the Supreme Court of the United States, rendered about the time this cause was taken under advisement, in the case of *Casey vs. Galli*, where it is said:

"Where a shareholder of a corporation is called upon to respond to a liability, as such, and where a party has contracted with a corporation, and is sued upon the contract, neither is permitted to deny the existence or the legal validity of such corporation. * * * Parties must take the consequences of the position they assume. * * * Sound ethics require that the apparent, in its effects and consequences, should be as if it were real, and the law properly so regards it."

No one will dispute that this is a sound principle of law, as well as of ethics, in every jurisdiction which has not a prohibitory law of the kind and scope of ours. But when the Legislature has declared that corporations unauthorized by law can not appear in a court of justice in their

corporate name, we understand that courts must say to them, when they do so appear, that they can not be heard.

And sound ethics will not be abraded when the parties who thus shelter themselves behind this prohibition can be pursued by the individuals who compose the corporation when suing in their individual names. And that is what the Code permits—not only permits, but prescribes—that courts shall not hear their demand when appearing in any other capacity.

Rehearing refused.

No. 5158.

FERDINAND M. GOODRICH VS. LOGAN HUNTON.

The order of a State court transferring a case before it to the circuit court of the United States may be appealed from.

Under the judiciary act of 1789 a suit is removable from a State to the Federal court, when the Federal court has jurisdiction of it, only on the application of the defendant, who is a citizen of another State, or is an alien, made at the time he files an appearance, and when the plaintiff in the suit is a citizen of the State wherein the suit is brought.

Under the said act of 1789 only an *original* suit, pending in a State court, is removable to the Federal court. Hence a suit brought in a State court to annul a judgment of that court, or to restrain its execution, being only an auxiliary suit, is *not* removable.

A Federal court is without jurisdiction to enjoin proceedings in a State court, and therefore, no suit pending in a State court, whose object is to enjoin the execution of a judgment of that court, is removable to the Federal court.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J.*

George L. Bright and Barrow & Pope, for plaintiff and appellant.

J. Ad. Rozier, for defendant.

The opinion of the court was delivered by

MARR, J. This suit was brought in the Fourth District Court for the parish of Orleans to have declared a nullity a judgment of that court in favor of Logan Hunton against Goodrich, and to prevent, by injunction, the enforcement of that judgment.

On the third of February, 1874, a few days after he was cited, Hunton filed a petition, with sufficient bond, praying for the removal of the suit into the circuit court of the United States, alleging that he was a citizen of the State of Missouri, and that Goodrich was a citizen of the State of Louisiana. The case was removed, and Goodrich appealed from the order of removal. His right to do so is beyond question.

Counsel for appellee state in their printed brief that the case was properly removable under the act of Congress approved twenty-seventh of July, 1866. In this they are clearly mistaken. No reference is made in

the petition to any special law under which the removal is demanded, but there are allegations in the petition which indicate the intention to bring the case within that act. Although the right may not be prejudiced by such error or omission where the case stated falls within any act of Congress authorizing the removal, it is nevertheless necessary to ascertain the law to which it is subject.

Prior to the passage of the act of the third of March, 1875, there were but three general laws allowing the removal of suits from the State courts into the circuit courts of the United States: the act of the twenty-fourth of September, 1789, commonly called the judiciary act; the act of the twenty-seventh of July, 1866; and the act of the second of March, 1867, known as the "prejudice or local influence" act. In analyzing these acts no reference will be made to aliens, because the case with which we are dealing is one in which all the parties are citizens of the United States, and no mention of the amount in dispute is necessary, because it is sufficient in this case to give jurisdiction to the circuit court.

The act of the twenty-seventh of July, 1866, is applicable to those cases alone in which there are at least two defendants, and the requisites for removal are:

First—That the suit be brought in a State court by a citizen of that State.

Second—That one of the defendants be a citizen of the State in which the suit is brought and the other defendant be a citizen of another State.

Third—The suit must be instituted or prosecuted for the purpose of restraining or enjoining such defendant, citizen of another State.

Fourth—Or, the requisites one and two concurring, it must be a suit in which there can be a final determination of the controversy, so far as it concerns the defendant citizen of another State, without the presence of the other defendants as parties in the cause.

These conditions existing, the defendant, citizen of a State other than that in which the suit is brought, may, at any time before the trial or final hearing of the cause, file a petition for the removal * * * as against him, * * * without prejudice to the right of the plaintiff to proceed in the State court against the other defendant or defendants. Statutes at large, 1865-66, pages 306, 307.

Before the passage of this act, there was no law authorizing a defendant, who, if he had been sued alone, might have removed the suit into the circuit court, to demand the removal when there were other defendants, citizens of the State in which the suit was brought, and the precise object of the act was to supply this deficiency in the existing laws.

In this case there is but one plaintiff, Goodrich, and but one defendant,

Hunton. The essential requisite, a suit by a citizen of the State in which it is brought, against a citizen of that State and a citizen of another State, is wanting; and the right of removal can not be claimed, nor can it be maintained under this act.

The act of the second March, 1867, is applicable to those cases alone in which the party, plaintiff or defendant, who desires to remove the suit files his affidavit in the State court, before the final hearing or trial of the suit, stating that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court.

Manifestly, the case does not fall within the terms of this act; and the act of third March, 1875, can not be invoked, because it was passed more than a year after the order of removal was granted. The right of removal, therefore, depends solely upon the act of 1789, section twelve, subject to the limitation imposed by the act of second March, 1793, section five.

The requisites under the act of 1789 are: That a suit involving the required amount be commenced in a State court, by a citizen of that State, against a citizen of another State; and that the defendant, at the time of entering his appearance in the State court, file his petition praying for the removal. This right belongs to the defendant alone; and it can not be claimed by the plaintiff by whom the suit was commenced, no matter what may be the citizenship of the parties.

The record does not show that Hunton made any appearance in the State court, except to present and insist upon his petition for removal; and his citizenship and that of Goodrich are not questioned. A proper case, therefore, is made out for removal, if the proceeding be one of which the circuit court could take jurisdiction.

The objects of this proceeding are—

First—To have the judgment of the Fourth District Court reviewed by that court and declared a nullity for want of jurisdiction. In this respect it is in the nature of a writ of error *coram nobis*.

Second—To have Hunton enjoined *pendente lite* and perpetually from executing that judgment in any manner.

First—In *Dunn vs. Clark*, 8 Peters, 1, Graham, a citizen of Virginia, obtained a judgment at law in the United States Circuit Court for the District of Ohio against citizens of that State. After the death of Graham the defendants in that suit filed a bill in equity in the same court, praying for an injunction against that judgment. All the complainants and all the defendants in that bill were citizens of Ohio, and the circuit court would have been utterly without jurisdiction on the face of the bill if the proceeding had been an original suit. The Supreme Court said:

"The injunction bill is not considered an original bill between the same parties at law."

Several persons were made defendants to the bill who were not parties to the suit at law, and the court held with respect to them that it was an original bill. Nevertheless, the court below was ordered to stay proceedings on the judgment at law until the complainants could have time to seek relief in the State court. If the court had regarded this as an original bill, the want of jurisdiction would have been so evident that no decree could have been rendered but one of dismissal.

In *Freeman vs. Howe*, 24 Howard, 460, the rule is thus stated by Justice Nelson: "The principle is that a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice or an inequitable advantage under mesne or final process, is not an original suit, but ancillary and dependent, supplementary merely to the original suit out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties."

Judge Nelson took occasion to say in this case, with reference to *Dunn vs. Clark*, in 8 Peters, the leading case, that, "It would seem, from a remark in the opinion, that the power of the court upon the bill was limited to a case between the parties to the original suit. This was probably not intended, as any party may file the bill whose interests are affected by the suit at law."

The meaning of the court is, and we think this is settled beyond question by uniform jurisprudence, that a proceeding to enjoin a judgment, brought in the court which rendered that judgment, is not an original suit, in any sense, where all the parties were parties to the original suit.

In *Bank vs. Turnbull*, 16 Wallace, 195, the bank, under a judgment against Thomas, seized property which Turnbull & Co. claimed as owners. An issue was made to try the right of property before a jury; but Turnbull & Co. removed the case into the circuit court under the act of the second of March, 1867.

The Supreme Court said this proceeding was merely auxiliary to the original action; "a graft upon it, and not an independent and separate litigation. The proceeding was necessarily instituted in the court where the judgment was rendered. No other court, according to the statute of Virginia, could have taken jurisdiction. That it was only auxiliary and incidental to the original suit is, we think, too clear to require discussion."

The case was remanded to the circuit court, with instructions to remand it to the State court for want of jurisdiction in the Federal court.

By our law an action to enjoin and annul a judgment must be brought before the court by which it was rendered when the only parties are the

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plaintiff and the defendant in the original suit, and no other court has jurisdiction. Code of Practice, articles 604, 610; see cases cited, Honnen's Digest, vol. 1, "Judgment" xi. (c).

We think this action is auxiliary, incidental, supplementary to the original suit, and that it could not be removed into the circuit court, because that court could not take jurisdiction of the original suit.

There is a marked distinction between the phraseology of the act of 1875, which was intended to control the entire subject of removal from the State courts into the circuit courts, and that of the act of 1789. The act of 1875, where the necessary conditions exist, authorizes the removal by either party of "any suit of a civil nature at law or in equity." What may be the precise meaning and effect of this act we are not now called on to decide, and we refer to it merely to show the difference and to say that decisions under it have no application to this case, which falls under the dominion of the act of 1789.

The language of this act, section twelve, is: "If a suit be commenced, etc., by a citizen of a State, etc., against a citizen of another State," etc. This statute looks to the commencement of the suit, to the original proceeding, and it provides for the removal of that original proceeding, and not of an auxiliary, or incidental, or supplementary proceeding, in the same court, between the same parties, which is but a continuation of the original proceeding.

In this case the original suit was brought by a citizen of Missouri against a citizen of Louisiana, in a court of the State of Louisiana, and, of course, under the act of 1789, it could not be removed into the circuit court by the mere terms of the law. The proceeding in the same court, between the same parties, to annul and to prevent the execution of that judgment was not a separate, independent, original suit; it was not the commencement of a suit; it was the continuation by a supplementary auxiliary proceeding of a suit which had been commenced years before, and it could not be removed, as was expressly decided in the *Bank vs. Turnbull & Co.*, 16 Wallace.

Second—Jurisdiction with reference to a special case means power, authority, competency to pass upon all the questions which legitimately arise in the case; and if, in any given case, a court can not hear and determine all the matters in controversy it has not jurisdiction of that case.

A wise appreciation of the necessity of avoiding as far as possible conflicts and collisions between the Federal and the State judiciary induced the Congress in 1793 to forbid the Federal courts to grant "a writ of injunction to stay proceedings in any court of a State." Act of the second of March, section five.

In *Diggs & Keith vs. Wolcott*, 4 Cranch. 179, a suit in equity was

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brought, in a State court of Rhode Island, praying a perpetual injunction of certain proceedings at law in a court of the same State. The suit was removed into the circuit court of the United States, and a decree rendered perpetuating the injunction as prayed for. On appeal, the Supreme Court of the United States reversed the decree on the single ground that the circuit court had no jurisdiction to enjoin proceedings in any court of a State.

This decision was approved and affirmed in *Peck vs. Jenness*, 7 How. 625, and quite recently in *Harris vs. Carpenter*, which was a bill in equity in the circuit court at New Orleans to enjoin the defendants from prosecuting certain suits in the State courts. The circuit court, applying section five of the act of 1793, dismissed the bill on demurrer, and this decision was affirmed by the Supreme Court. October term, 1875; 1 Otto, 254.

If it be conceded that the circuit court could take jurisdiction of so much of this proceeding as involves the nullity of the judgment, which we do not admit, it is not possible to claim for that court the right, the power, to enjoin, either *pendente lite* or perpetually, further proceedings in the State court on that judgment. The jurisdiction of a court depends on the case made by the pleadings, not upon the decision which the court may render on the hearing. If the testimony and the law applicable to it should make out a case entitling Goodrich to a judgment annulling the original judgment and perpetually enjoining further proceeding on that judgment, it would be the duty of any court having cognizance of the cause so to order and adjudge; and the court which has not the power, the court which is forbidden by law so to decree, has not jurisdiction, and is without authority to hear and determine the cause. That the circuit court has no such power, that it is under positive statutory prohibition to interfere with proceedings in the State courts by injunction, either *pendente lite* or by final decree, is too clear for argument.

We may add that the act of 1793, and the decisions applying and enforcing it, have received legislative sanction in the Revised Statutes of the United States, section 720: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The decision in *Gaines vs. Fuentes*, 1 Otto, is not applicable to this case, from which it differs widely. In that case the original proceeding was the *ex parte* application of Mrs. Gaines to have the will of her father probated. Years after, strangers to that proceeding, against whom Mrs. Gaines was using this will as a muniment of title, brought suit to recall the order of probate, and to annul the will. Mrs. Gaines demanded the removal of the case under the act of the second of March, 1867. The

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Supreme Court of the United States said this was a new suit; essentially a suit in equity, and not a mere continuation of the *ex parte* proceeding in which the will had been admitted to probate. No injunction was asked for in the case, and the right of removal was maintained because it was a suit brought in a State court in which there was a controversy between citizens of that State and a citizen of another State, and the citizen of the State other than that in which the suit was brought had complied with the requirements of the act granting the removal.

We think the order of removal was improperly granted; that the proceeding was one of which the circuit court could not take jurisdiction, and that the plaintiff is entitled to have the case heard and determined in the State court in which it originated.

It is therefore ordered, adjudged, and decreed that the order appealed from directing the transfer and removal of this case from the Fourth District Court for the parish of Orleans into the circuit court of the United States, Fifth Circuit, in and for the District and State of Louisiana, be avoided and annulled; that the cause be remanded to the Fourth District Court for the parish of Orleans, and be there proceeded with according to law, and that defendant, appellee, pay the costs of this appeal.

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No. 6517.

SUCCESSION OF FRANÇOIS BOUGÈRE. ON OPPOSITION OF AMÉLIE RICHARD.

The public notification of the filing of an account, and tableau of distribution by an administrator, operates as a legal citation to creditors and legatees. An administrator need not directly prove up every item of his account, which is not opposed.

A judgment homologating the account of an administrator can only be rendered in *term* time, and in *open court*. It can not be rendered by the parish judge in vacation, or in chambers.

APPEAL from the Parish Court, parish of St. Charles. *Earhart, J.*
C. F. Claiborne, M. Marks, and James D. Augustin, for executor.
Breaux, Fenner & Hall, for opponent.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

MANNING, C. J. Achille D. Bougère filed a tableau of distribution of the succession of François Bougère, in his capacity of dative testamentary executor thereof, on July 3, 1876. Notice of the filing was published, and on the nineteenth of the same month, no opposition having been filed, the tableau was homologated. On the twenty-second of the same month Amélie Richard filed an opposition to the tableau. She is as-

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signee of Elie Bougère, who is one of the legatees of the deceased. The assignment of Elie Bougère is not contested on the one hand, and on the other it is conceded that the opponent has only such rights as her assignor had.

The executor moves to dismiss the appeal of opponent, for the reason that she has no interest in the affairs of the succession.

On the fourteenth of February, 1876, a decree was entered in the suit No. 5475 of the docket of this court, entitled "Succession of François Bougère," on the opposition of Elie Bougère and others, appellants, in which a motion to dismiss was likewise made. The following extracts from the opinion then read are pertinent to the present controversy:

"The appellee moves to dismiss the appeal on the grounds following:

"First—That the appellants have voluntarily executed the judgment appealed from and have voluntarily acquiesced in and ratified its execution. * * *

"Third—That the claim of Achille Bougère, Marguerite Bougère, *Elie Bougère* has been settled since this appeal was granted, as per affidavits and exhibits hereunto annexed.

"Fourth—That the appeal was granted to above parties upon condition that they should furnish bond; * * * and that they settled their claim and acquiesced in the judgment."

Other grounds are set forth, not relating to Elie, and the court proceeds: "The executor rendered an account which was homologated. In it he had made a distribution or partition of the property among the legatees, after paying creditors. Some time after this judgment *Elie*, Marguerite, and Achille obtained an order for a suspensive appeal, but they subsequently received from the executor the shares or amounts adjudged to them by the judgment." That appeal was dismissed because of the voluntary execution of the judgment.

An appeal in another suit, No. 5872, was decided at the same time. A petition had been filed by Elie Bougère praying the dismissal of Filleul, the testamentary executor, and a judgment had been rendered to that effect, and also appointing Elie Bougère executor of the succession, and ordering its assets, including a considerable sum of money in bank, to be delivered to him. This was pending the appeal of the case just noted. A prohibition was prayed and obtained by Filleul against Elie Bougère and the judge who had granted these orders and rendered the judgment of dismissal, upon presenting a petition in which is this allegation: "That he has duly administered said estate and filed his account and tableau of the full assets of the succession in cash, and credits, and values, which was duly homologated by final judgment of the parish court, the oppositions to which were all dismissed, and the oppo-

nents took devolutive appeals, which are now pending." Further proceedings by the judge and the contestants were arrested by the writ of prohibition, and on the hearing in this court the writ was made peremptory on the same day that the decree was rendered on the oppositions to the account.

The counsel for the executor is in error in his position that this court decided in the suit involving the account and the oppositions that Elie Bougère had received his share in this succession from Filleul. The language of the court is that Elie and his co-opponents subsequently received from the executor the shares or amounts *adjudged to them by the judgment; i. e.*, the judgment on the account of Filleul rendered in 1875. The counsel is also in error in supposing that in the prohibition the question of interest was either directly or indirectly decided. No exception was filed by Filleul, that we have seen, on the ground that Elie Bougère had no interest in the succession. The petition praying the writ of prohibition recites the details of the litigation on the account and oppositions, and alleges that the same issues are there made as in the opponent Elie's suit for dismissal, and that all parties are awaiting the decision of the Supreme Court on the pending appeal, and the writ was granted to stay proceedings until that decision is made, which adjusted the rights of the parties, and by a construction of the will determined the interests of the various parties to the litigation.

The judgment of this court in February, 1876, was that Elie Bougère had received all that appeared to be due him by the account of Filleul, and that was embraced in it. But was that a final account and complete administration of the affairs of the succession? Manifestly not, because another executor has been appointed to complete what Filleul left unadministered, and this dative executor has had something to account for, otherwise there would be no suit before us now. The present suit has for its origin an account presented by that executor.

We are also referred to the account in this record and the receipts of Elie Bougère as supporting the averment of his want of interest. If we were to assume that the items of the account are supported by vouchers, and the distribution of assets is in accordance with the rights of the legatees, and that this account is final and nothing more remains to be administered, we could then satisfy ourselves that Elie Bougère had been paid all, and more than all, he was entitled to. His receipts exceed his share, if we are to be guided by what appears on the face of the papers. But there are no vouchers in the record, no testimony having been offered on the homologation apparently, and there is something else to administer. The acceptance of service of notice by the attorney of some of the legatees is: "Notice of the filing of this account acknowledged, citation waived, and consent that the uncollected notes be sold

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as prayed for herein." Referring to the prayer thus alluded to, we find the dative executor in his petition presenting his account, and the tableau of distribution says: "As to the balance of the assets, being the uncollected promissory notes mentioned herein, owing to the difficulty of collecting the same and the injurious delay it would occasion the final winding up of the succession, the executor proposes to sell them at public auction."

We are not prepared to say that Elie Bougère has received all that he is entitled to under the showing made in the record, and is without interest further in the succession, and therefore the motion to dismiss can not prevail.

ON THE MERITS.

The opinion of the court was delivered by

MANNING, C. J. The errors assigned, for which the opponent claims a reversal of the judgment of the parish court, are:

First—That the tableau was homologated without notice to Elie Bougère or to opponent, his assignee.

Second—The judgment of homologation was rendered and signed at chambers.

Third—Three judicial days did not elapse between the rendition of the judgment and the signing thereof.

Fourth—The judgment was rendered without proof of the correctness of any item thereof.

Answering the first objection, the executor points to the proof of the publication of the filing which we find in the record complete, and insists that such publication is notice to all persons concerned, while the opponent maintains that her assignor is an heir and entitled to special notice or citation. Elie Bougère was a legatee. He acquires his right to a part of his relative's property from a provision in the will. The notification of the filing of the account and tableau of distribution of an executor operates as a citation to all persons concerned, creditors as well as legatees, and the homologation of the account and tableau bars all further inquiry as to all matters included therein. Succession of Peytovin, 10 Rob. 118; succession of Egana, 18 An. 263.

The Code requires the judge to order, on demand of the administrator, that the creditors and legatees of the succession be notified to show cause within ten days why they should not be paid according to the tableau of distribution presented by him. C. C., article 1057, new number 1064. And in Millaudon's case it is said the published notice prevents an heir who has neglected to oppose payments to creditors from contesting their legality: 6 La. 225.

It appears the judgment of homologation was signed at chambers, and the opponent quotes article 543, Code of Practice, requiring all judgments to be read by the judge in open court. Under the constitution of 1852, which gave the Legislature authority to confer certain powers on clerks, and under the legislation subsequently had, clerks had power to homologate the accounts and tableaux of executors so far as not opposed, and this was necessarily done in chambers. The parish judges are charged with this duty under the present constitution, and are required to hold frequent probate terms to facilitate the settlement of estates, when judgments should be entered. A judgment prepared and signed in vacation by the judge in a case in which no decree could be rendered in chambers, has no effect until entered upon the records at the ensuing court. *Dorsey vs. Hills*, 4 An. 106. The judgment of homologation in this case was rendered in chambers and was entered upon the records in open court at the ensuing term. It is true that in the interval between the rendition of the judgment (nineteenth of July) and the first day of the next term (twenty-fifth of July) the opposition which commenced this litigation was filed, viz.: on the twenty-second, and on the first day of the term opponent ruled the executor to show cause why the judgment should not be vacated; but we have already said the publication was notice to the legatee and to his assignee, and the opposition came too late, and the rule was still later.

On the third assignment of error, we do not think three judicial days must elapse between the homologation and signing the judgment; and to the fourth, that there was no proof of the correctness of any item of the account, the executor is not driven to proof of each separate item of his account unless it is opposed. "The presumption is in favor of the executor, who is an officer of the law, and direct proof of every item is not required," said the court in the succession of *Wederstrandt*, 19 An. 494.

It would have been more regular to have filed the vouchers for each item when the account was filed, and they could have been demanded by any opponent who had acted in time. Other legatees, who are more largely interested than the opponent, do not appear to have discovered the objections set forth by her, and it is undeniable that they had opportunity to object. That circumstance does not conclude opponent, for *non constat* that one legatee will not object to what another approves. But it relieves us of any apprehension that by dismissing her opposition and rule any substantial injury is done to the interests of *Elie Bougère*, of which she is assignee.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court is affirmed with costs.

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ON REHEARING.

The opinion of the court was delivered by

MANNING, C. J. A rehearing was granted of this cause because of our doubt of the correctness of the statement that the judgment of homologation was rendered and signed in vacation, and which we declared had no effect until entered upon the records of the ensuing term. We meant by this, that said judgment, thus rendered in vacation, was not complete, or, to state it more broadly and more perfectly, that the power to homologate accounts in chambers, which was formerly confided to the clerks, no longer exists, and the homologation by the parish judge under the present constitution must be made in open court, and if made in chambers in vacation derived no force or effect from that fact, but must be renewed, as it were, in open court, and spread upon the records.

We are now informed that this judgment was signed during a recess of the parish court, which had adjourned from a day anterior to the nineteenth July, the day the judgment was rendered, to the twenty-fifth of same month. It was not a new term that commenced on this latter day, but the court re-opened its existing term, and on the first day it was thus re-opened the opponent filed her opposition.

In order, however, that our ruling may be freed from any doubt, and not be confused by qualifications, we now say that the parish judges have not the right to homologate the accounts of executors in chambers. It must be done in open court. The legislation that accorded to clerks the power to homologate accounts had its origin and its excuse in the necessities of the system then established, and this power could be exercised in chambers only after a much longer publication (thirty days) than was required for homologation, made by judges in open court. This power to homologate accounts in chambers disappeared with the system of which it was a prominent as well as anomalous feature, and these judgments of the parish judges can now be made only in term.

It follows that the opposition was filed in time in the present case, for there was no judgment rendered on the twenty-fifth, when the court re-opened. The executor contented himself with producing the judgment rendered on the twenty-second, out of term, and that did not preclude the opponent from taking action against the account.

It is therefore ordered that the cause be remanded to the lower court for trial of the issues raised by the opposition of Amélie Richard, and to that end, it is adjudged and decreed that our former decree is reversed and set aside, so far as it conflicts with that now rendered, and that the succession pay the costs of this appeal.

No. 6140.

SUCCESSION OF DRAUZIN TRICHE.

The purchaser of property sold at probate sale, which is incumbered by a mortgage antedating the title of the deceased owner, is entitled to reserve in his possession enough of the purchase price to satisfy the mortgage.

The creditor of an insolvent succession, with a *first* mortgage on a piece of its property, who buys in the property, may retain in his hands the amount of his mortgage; provided, he gives security to refund whatever may be finally shown is not to be applied to his mortgage.

But the creditor with an inferior, or concurrent mortgage, who bids in the property, must pay over the amount of his bid.

A PPEAL from the Parish Court of the parish of Lafourche. *Knobloch, J.*

Clay Knobloch, for administrator and appellee.

Louis Guion, for Jules Lapéne.

The opinion of the court was delivered by

SPENCER, J. Drauzin Triche died leaving a considerable estate, consisting of movables and several tracts of land. The estate appears to be largely insolvent—no less than forty mortgages and privileges being certified against it.

On an undivided fourth of one of these tracts of land Pierre Rousseau holds a special mortgage and vendor's privilege for several thousand dollars, imposed and granted, not by Triche, but by his vendor.

Sundry legal and judicial mortgages are inscribed against Triche, and subsequent to some of these there is inscribed a special mortgage on the whole of the above-mentioned Rousseau tract in favor of Lapéne & Ferré for over six thousand dollars. The correctness of this debt to Lapéne & Ferré is not contested, but admitted and recognized by the administrator of Triche.

Certain other parties, mortgage creditors, took a rule on the administrator of Triche and obtained an order to sell all the property of the estate to pay debts. Lapéne & Ferré also obtained an order for a meeting of creditors of the estate as insolvent, but the administrator enjoined the proceeding, and nothing further seems to have been done under the order. In the mean time the property of the estate was sold in lots, and Lapéne bid off lots to an amount exceeding ten thousand dollars. Most of the lots bought by him were subject to the mortgages of Rousseau and of Lapéne & Ferré; but some of them were outside of the lands subject to said mortgages, as were also certain movables bought by him. The sheriff demanded of Lapéne the amount in full of his bid, in cash, but the latter refused to pay, alleging —

First—That he had the right to retain in his hands the amount of the Rousseau mortgage, so far as it operated on the lots bought by him; and,

29 384
48 413
48 540

29 384
50 754

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Second—To retain the amount of the mortgage of his firm, Lapène & Ferré, until final settlement of the estate, upon giving security for restitution of such portion thereof as might be declared not applicable to said mortgage.

The sheriff and administrator thereupon took a rule upon Lapène to show cause why the property bid in by him should not be resold, *à la folle enchère*; and Lapène in his turn took a rule on the sheriff and administrator to show cause why he should not be put into possession and title be made to him of the same property.

These rules were tried together, and the probate court made the former absolute and discharged the latter. Lapène prosecutes this appeal from the decision of both cases.

The questions presented are, did Lapène have the right to withhold—

First—The amount of the Rousseau mortgage and vendor's lien so far as operating upon the lots bought by him?

Second—The amount of the mortgage due his firm of Lapène & Ferré, upon giving security for restitution?

So far as relates to the personal property and lots bought, not embraced in his or Rousseau's mortgage, we see no possible right in Lapène to retain the price.

As regards the first question above put there is no doubt that the property passed subject to and incumbered by the Rousseau mortgage. A probate sale divests only such mortgages as were imposed by the deceased. 9 L. 13; 11 An. 383; 3 R. 5; 8 R. 99.

A purchaser is bound for nothing beyond the amount of his bid. The administrator of Triche had no right to receive, and therefore no right to demand, payment of the amount due to Rousseau, who was not a creditor of Triche, and whose mortgage antedated the latter's title. The amount due to Rousseau on the lots bid off by Lapène must therefore of necessity be left in the hands of the latter, who by his purchase assumed its payment, and in whose hands said lots continued to be incumbered by it.

We see no reason for distinguishing this case from that provided for in articles 679 and 683, Code of Practice. These articles provide in substance that when there exist antecedent mortgages and privileges which the sale does not divest, the sheriff shall give notice that the property is sold subject to them and on "condition that the purchaser shall pay into his hands whatever portion of the price of adjudication may exceed the amount of the privileges and special mortgages to which such property is (sold) subject;" "that the purchaser shall be entitled to retain in his hands, out of the price of adjudication, the amount required to satisfy the privileged debts and special hypothecations to which the property was (sold) subject."

True, these articles relate to sales of real estate under writs of *fiери facias*, but we apprehend that they are equally applicable to sales under orders of seizure and to other judicial sales where the sale will not have the effect of divesting the property of such preferred mortgages and privileges. In point of fact the administrator of Triche certainly could not sell and deliver a greater right in the property than Triche himself had; and his right in that property was subject to the Rousseau mortgage.

The property was only worth what it would bring, and the price bid must be taken as its absolute value, and this pre-existing and continuing mortgage must be considered as embraced in that price. The amount of said mortgage therefore, so far as it operated upon the lots bought, must be deducted from the bid and left in the hands of the purchaser. There would be no justice in permitting the estate of Triche to enrich itself to the extent of the Rousseau mortgage by imposing its payment on Lapène over and above the value of the property. The article 2535, Civil Code, has no application to this case.

The second question relates to Lapène's right to retain in his hands the amount of the mortgage due his firm.

The estate of Triche is clearly shown to be insolvent by the administrator's provisional account, and should, perhaps, have been administered as such under the direction of its creditors. But that course seems to have been defeated, and the property sold at ordinary succession sale to pay debts.

As, however, the estate is insolvent and to be distributed *in concursa*, the rules applicable to insolvent estates may very properly be applied here.

In *Goodale vs. His Creditors*, 8 L. 302, the court held that at a sale of the property of an insolvent, provoked by the first-mortgage creditor, he may, if he purchases the mortgaged property, retain the price on giving security to refund such portion thereof as may on final settlement be found not applicable to payment of his mortgage; but if there be superior or concurrent mortgages, he can not so retain the price.

In 11 An. 594, Justice Buchanan as the organ of the court says it seems as well settled that a mortgage creditor purchasing at probate sale may retain the price upon giving security. Justices Slidell and Spofford dissented on the ground that in that case the mortgage was tacit and the debt disputed and in litigation. On rehearing, Merriek, Chief Justice, delivering the opinion (Buchanan and Voorhies dissenting), held that, whatever may be the law as to purchases by holders of special mortgages, the holder of a tacit mortgage can not retain the price until his claim is liquidated.

We think the better opinion is that a special mortgage creditor first in

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rank may, if he purchase the mortgaged property at probate sale, retain the price upon giving security as stated; but if there exist mortgages superior or concurrent, he must pay over the amount of his bid.

An examination of the record in this case does not enable the court to decide definitively upon the rights of the parties. The provisional account and tableau filed by the administrator (and which it seems is contested) and the mortgage certificate in evidence show certain judicial and legal mortgages on the property subject to Lapène & Ferré's mortgage older than and therefore superior in rank to theirs. But as there may be other property which must be first applied to these general mortgages, and as their amounts are perhaps in dispute, we think it safer to remand this case in order that the existence, amounts, and rank of these general mortgages may be ascertained and fixed contradictorily. If it shall be ascertained that said legal and judicial mortgages are preferred and must be paid in preference to Lapène & Ferré's mortgage out of the property embraced in the latter, then the rule should be made absolute requiring Lapène to pay over the surplus, after deducting the Rousseau mortgage, and in default, within a time to be fixed, ordering the property to be resold *à la folle enchère*. If said mortgages are found not to exist, or not to be preferred to Lapène & Ferré's mortgage on said property, then the rule taken by Lapène on the sheriff should be made absolute, and the sheriff ordered to make the title upon said Lapène giving satisfactory security to refund such sum as may be necessary on final settlement of the estate. So far as relates to lots and personal property bought by Lapène, not embraced in the Rousseau and Lapène & Ferré mortgages, of course he can not pretend to hold the price, and to that extent the judgments appealed from must be affirmed.

It is therefore ordered, adjudged, and decreed by the court that the judgments appealed from be avoided and reversed, except so far as relates to the lots and personal property bought by Lapène not subject to the Rousseau and Lapène & Ferré mortgages; and it is further ordered that this case be remanded to be proceeded with according to law and in conformity to the views herein expressed, and that appellee pay the costs of this appeal.

No. 4692.

JAMES REID VS. LOUISIANA STATE LOTTERY COMPANY.

- The oral or written declarations of an alleged co-conspirator will not be admitted in evidence, until the conspiracy itself has been proved. Nor are such declarations to be received against another alleged co-conspirator, after the object of the conspiracy has been achieved.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J.* Trial by jury.

Race, Foster & E. T. Merrick, and Finney & Miller, for plaintiff and appellants.

Joseph P. Hornor, R. S. Dennee, A. A. Atocha, and Semmes & Mott, for defendant.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

LUDELING, C. J. The motion to dismiss this appeal is based on a defect in the certificate of the clerk—the want of his signature. The omission appears to have been supplied since the filing of the motion, and the appellant has asked for an order to compel the clerk to sign the certificate *nunc pro tunc*, if it be considered that the clerk improperly signed the certificate without the permission of the court. This order could be applied for and could be granted at any time before trial, and, as the certificate is now signed by the clerk, to grant the order would be doing a vain thing. It is ordered that the motion be refused.

ON THE MERITS.

The plaintiff sues the defendant for thirteen thousand dollars upon a lottery ticket which he alleged drew a prize of that amount. He alleges he purchased the ticket on the eighth of February, 1872, in Bayou Sara, and that the lottery was drawn on the same day in New Orleans.

The defense is that the policy ticket sued upon was fraudulently made out and entered upon the "Register" or "Book of Plays," after the lottery had been drawn, by the employee of the defendant, who combined and conspired with the plaintiff and others to defraud defendant.

The case was tried by a jury, who rendered a verdict in favor of the defendant. The plaintiff appealed.

Several bills of exceptions were taken, but the defendant having waived in this court all objections to the evidence, it will be necessary to consider only one of the bills of exceptions. It is the bill of exceptions taken to the reception of the testimony of Guthreaux in regard to declarations of Innerarity, the employee of defendant, and letters of said Innerarity to said Guthreaux in relation to the alleged conspiracy. The let-

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ters are dated December 13, 1871; January 1, 1872; February 1, 1872; February 11, 1872; June 8, 1872; and July 2, 1872.

Innerarity's testimony had been taken for the plaintiff twelfth of June, 1872; and for the defendant October 12, 1872. Most of these letters had been sent by mail and had been received by Guthreaux shortly after their dates respectively. The objections urged against this evidence were that "the declarations and letters of said Innerarity, to which the plaintiff was no party, can not make evidence against the plaintiff; and that said Innerarity had not been interrogated on this subject, and, if admissible at all, it should have been shown by him and not by this witness, as this made it hearsay testimony."

The objections were properly overruled. The evidence was admissible on the ground that the acts and declarations of one conspirator are admissible against his accomplices, or as part of the *res gestæ*. Mr. Greenleaf says: "There are other declarations which are admitted as original evidence, being distinguished from hearsay by their connection with the principal fact under investigation. The affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and in its turn becomes the prolific parent of others; and each during its existence has its inseparable attributes and its kindred facts materially affecting its character and essential to be known in order to a right understanding of its nature. These surrounding circumstances, termed the *res gestæ*, may always be shown to the jury along with the principal fact, and their admissibility is determined by the judge, according to the degree of their relation to that fact, and in the exercise of his sound discretion." Sections 108 to 111. Again he says: "The term *acts* includes written correspondence, and other papers relative to the main design." Page 123.

There is no other question of law involved in this case.

It is not our province to disturb the judgment of the district judge or the verdict of a jury with regard to questions of fact, except such judgment or verdict be manifestly erroneous. After a careful examination of all the evidence in the record, we can not say that the verdict and judgment are manifestly erroneous.

It is therefore ordered that the judgment of the lower court be affirmed with costs.

WYLY, J. I dissent, and will file my reasons hereafter.

ON REHEARING.

The opinion of the court was delivered by

MANNING, C. J. This suit is for the recovery of thirteen thousand six hundred dollars, a prize drawn by plaintiff in the lottery company on

the eighth of February, 1872. In the previous December, John J. Innerarity had opened a branch office of the company at Bayou Sara for the purpose of vending lottery tickets. He presented, on his arrival, to Messrs. Mumford & Brother a letter of credence from Pike, Brother & Co., written, it appears, by request of C. T. Howard, the President of the company at New Orleans. This letter accredited one Hollingsworth, but Innerarity opened the office, and was treated by all parties as the person designated in the letter.

The mode prescribed for conducting this branch office was precautionary, and well calculated to guard against fraud or malpractices. At half-past three o'clock every day Innerarity was to close his office, having already made a certificate of his sales, which, it appears, is called the "book of plays," and which he was required to envelope with a heavy covering, seal it with wax, stamp it, and deliver it to the Mumford Brothers, or one of them, who thereupon were to deposit it in their safe, and send it to Pike, Brother & Co. at New Orleans by packet steamer. The drawing of the lottery was made at four o'clock same day here.

Shortly after midday of the eighth of February the plaintiff bought the ticket of Innerarity, who made his return the same afternoon before the required hour to Mumford, who in his turn indorsed the package in the usual way, and deposited it, sealed and stamped, in his safe, and it was forwarded to the main office in New Orleans at the regular time. The result of the drawing was usually known at Bayou Sara the next morning, and accordingly on the ninth Innerarity received the regular report from the company, showing that Reid's ticket had drawn the prize for the amount of which he now sues.

The defense is, that there was a fraudulent combination between all these parties to practice a deceit upon the lottery company, and that it was effected by substituting another book of plays to the one deposited with Mumford, which was made after the news of the drawing reached Bayou Sara. This new book of plays conformed to the actual drawing. The theory of the defendant is that Innerarity received intelligence early on the ninth of the actual drawing, made his book to contain the numbers which had drawn the sum already mentioned, and got possession of the sealed package delivered to Mumford the preceding evening, and took out the book made then, and put this new one in its place.

It may be well to mention that this "book of plays" is nothing more than a piece of thinnest paper, upon which is inscribed in numerals and in technical terms the plays made by each player, or ticket-purchaser. We discard the use of the jargon employed to describe the operation, and have learned only enough of it to enable us to understand what was meant by the parties.

The testimony of Innerarity was taken on the twelfth of June, 1872,

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before the trial of the cause, in which he details the sale of the winning ticket to the plaintiff, the registry of it, the inclosure of this latter in the sealed package, and its delivery to Mumford—in short, showing the regularity of his proceedings, and their conformity to the regulations prescribed for his guidance by the company. On this occasion the plaintiff addressed to him this question: "It is alleged in the defendant's answer that the ticket sued on was made out and so entered on the registry, after the drawing of the lottery, with the fraudulent design of defrauding the respondent, and that this was done by himself (the witness), then acting as vendor, and in connection with and to the knowledge of the plaintiff and others who conspired with and assisted him in that fraud. What do you say in response to that charge?" His response was: "I say it is false."

In the following October Innerarity's testimony was taken on the trial by the defendant, and he then recites with minute circumstantiality the progressive steps of the plaintiff and himself in perpetrating the fraud charged upon them, and unblushingly publishes his villainy. According to his account then given, the plaintiff obtained possession of the book of plays, which he had delivered sealed to Mumford, and returned it to the witness about five o'clock of the evening of the eighth. At seven o'clock of the morning of the ninth the steamer Katie brought to him the report of the previous evening's drawing, and he then made a new book of Reid's play, conforming to the successful numbers, and substituted that for the one first inclosed in the package, which had been broken open by him for that purpose. In other words, he sustains the defense, and confesses his previous perjury.

It is unnecessary to say that this witness is not to be believed. Nothing that he said on either occasion is entitled to any credence, except in so far as it is confirmed by other witnesses, or supported by the circumstances attending these transactions, or is in conformity with the surroundings of the parties. We have, however, his letters, contemporaneous with these events, which, unless otherwise explained or construed, would give color to the defendant's theory, and the witness's last version of this transaction.

Innerarity's correspondence with a resident of New Orleans of the tenth of February, two days following the drawing, contains the following sentences: "Many thanks for Thursday's drawing. Katie came in beautiful time, 7 a. m., best time she has made since I have been up here. Put in on Thursday's book for a, c, f, * * * A, B, 1, 2, and 6; you know, pretty good hit is it not? Will explain when I come down; am satisfied C. T. H. will want to interview me now." On the eleventh he writes informing his correspondent that the plaintiff left that morning for New Orleans, having a ticket for \$13,600 in which he is interested to

the amount of one-third, less a small deduction, and adds: "I wish you would keep me posted. In case the company makes an immediate settlement, telegraph me to come down. I don't doubt but that Reid will play fair, but as our acquaintance is only of a couple months standing, and he so readily agreed to beat Charley Howard, he might possibly beat me. * * * My reasons particularly for asking you to keep an eye upon the money in case it is paid, is because a certain uneasiness on my part caused by a remark of Reid's. After I made the proposition to him he told me that Mumford made the remark, 'I have no guarantee you fellows will not go back on me,' and says he, 'I said to him, if there is any go back at all, it will be you and I that will go back on Innerarity.' * * * These are my reasons for asking you to look out for me. When two such intimate friends as Reid and Mumford doubt each other, why I want some one like yourself, etc."

These assertions would be entitled to great weight if the source from which they come were not so impure. We must read them by the light of other information, derived from the same parties, that the writer's main purpose in accepting the agency at Bayou Sara was to insure a pecuniary benefit to himself, to be obtained by practicing a fraud upon his employer. It will not escape remark that this accords in one aspect with the theory of defendant, who urges, not without plausibility, that this was the special occasion selected by the agent to practice the fraud contemplated by him. But it was impossible to perpetrate that fraud, in the manner in which it is said to have been done, without the active co-operation of Reid and the Mumfords, and we shall see further on the impossibility of such co-operation. Our theory is, that after Innerarity had ascertained the success of Reid's play, he instantly concocted a scheme to evolve benefit to himself out of it, and these letters were the first efforts of his artful ingenuity in that direction.

Much importance is attached to the time when the Katie reached Bayou Sara on the ninth. If she made her first landing there at seven o'clock a. m. of that day, there would have been ample time for Innerarity to have made the substitution of the false play. But time was not the only thing needful to enable him to accomplish that. The assistance of others was absolutely necessary.

John P. Mumford's testimony is that the sealed package containing the plays in the lottery of February 8 was handed him on the afternoon of that day by the clerk Phillips, and he deposited it in the sub-treasury of the safe, locked it, put the key in his pocket, and was absent from the town with the key until the next day, and that no one could have got the package from the safe but his brother, who had the only other key.

F. M. Mumford says that neither Reid, Innerarity, Phillips, nor any one else could have got the package out of the sub-treasury; that his

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brother went in the country with one key and witness had the other, and that the package remained where his brother had put it undisturbed until it was taken out and forwarded to New Orleans, as was their custom to do every day. There was no way of getting the package out, save with one or other of the keys, or by breaking open the safe, and the safe was not broken open. Both these witnesses denounce the contrary statement of Innerarity as false.

M. P. Phillips, the clerk, says that Innerarity handed him the package of plays on the afternoon of the eighth of February, shortly before four o'clock, and that he delivered it to John P. Mumford, who put it in the sub-treasury of the safe in witness's presence, and no one thereafter could have access to it but the two Mumfords.

Reid, the plaintiff, repels the charge of his complicity in the alleged abstraction and alteration of the book of plays as false and malicious. He did not know, on the eighth or ninth that this book was ever delivered to the Mumfords. It was not until afterward that he learned that the Mumfords were the custodians of it by arrangement with the lottery company. He swears emphatically that neither Innerarity nor any other person ever made any proposition to him such as that witness has deposed in his last testimony; that there was not any collusion between him and Innerarity, and that he bought the ticket before two o'clock on the eighth, regularly, and in the same manner of previous purchases.

But this is the testimony of parties who are implicated. They are alleged to be the co-conspirators of the agent of the defendant. Resort is then had to proof of the character of these persons. Twelve witnesses, themselves above reproach, have sworn that the Mumfords and Reid are incapable of the act attributed to them; that they are men of recognized integrity and truthfulness, and that the act is so out of harmony with their daily walk and conversation that it is incredible. And if a blameless life, and erect moral attitude, preserved during the mutations of business and social life, is not a shield to protect him who bears it from the shafts of malevolence and perfidy, where shall we find one? The changes which have been made both in the law of evidence and the qualifications of witnesses, have opened the door to much testimony that in former times would have been rejected, and the character of a witness has thereby become of increased importance. Courts must scrutinize and weigh testimony as men do in the ordinary routine of life, and particularly must this court do so, since it is entrusted with the power to review all the facts and to reverse or amend the verdict of juries. And as men of sound mind and unbiased judgment would not in the most trivial matters of ordinary life believe a confessed perjurer as against three reputable men, so we can not give our judicial sanction to a defense based upon the theory that the three reputable

men are perjurers and the perjurer has alone told the truth, and told it, too, upon one occasion only, and at the very time when he avows his previous false swearing.

We are reminded that the verdict of the jury was for the defendant, and it is urged that verdicts should not lightly be disturbed. The jury were deprived of much important testimony by the ruling of the judge, presently to be noticed, and they had not before them all that we have, the excluded testimony having come up, subject to the bills taken to that ruling. But it is a part of our function to ascertain whether a jury has rendered a proper verdict, and if not, to render one, such as they should have done, and to give judgment accordingly. Under the common law, the jury has a special and exclusive function. It alone can determine the questions of fact. This principle is deeply imbedded in that system. But a jury is an anomaly, an excrescence, in the system of the civil law. There the prætor, the judge, decides law and fact, and the jury has been superadded here by a sort of contagion imparted by our sister States, and has been adopted so recently in continental countries, where the civil law prevails, that it can scarcely yet be said to have become acclimated there.

The jury had not before them the deposition of Innerarity wherein he pronounces the allegation of a fraudulent conspiracy between himself and the plaintiff to be false and unfounded; wherein he details the regularity of the whole transaction, and vouches the good faith of all the parties. This testimony, which was offered to show what the same witness had formerly sworn to in the same cause, was excluded by the judge for the reason, "as the witness is in court giving his evidence orally, the former deposition is dead, null, and void, and can neither be received in evidence nor referred to for the purpose of contradicting the witness."

This ruling is remarkable, and the reason assigned for it is more remarkable than the ruling. It is proper to observe that the counsel who have presented the defendant's case to this court declined to countenance an error so patent and gross, and therefore waived our consideration of the bill.

The only bill necessary for us to consider is that taken by the plaintiff to the admission of Innerarity's letters. It will be seen that we have treated these letters as if they were properly admitted, by quoting from them, and thereby giving to defendant the benefit of all the testimony he had offered. But they were inadmissible, and for the reason that they were offered to show the assertions and statements of one of the conspirators in this scheme of spoliation, when no conspiracy had been proved. It was only charged. It should have been proved first, and a basis thus laid for their introduction. There is another reason for their

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rejection quite as good. The common enterprise was at an end. The conspiracy, if any existed, had accomplished its purpose, but these letters were written subsequent to that accomplishment, and no conspirator is permitted to affect his accomplices by writings or declarations made subsequent to the accomplishment of the common design.

There is also urged in defense the non-payment by the plaintiff of the price of the ticket, which should preclude him from a judgment for the sum drawn by it, and the non-receipt by the defendant of the purchase price. The evidence is sufficiently satisfactory of the payment by the plaintiff to the agent, and if the defendant's agent did not pay to him, his recourse must be by other means than a refusal to recognize the validity of the sale.

Lastly, we have been urged to remand the case for more precise proof of the time of the Katie's landing on the ninth of February, and whether Innerarity boarded her on her first landing, and also touching the payment by Reid of the price of the ticket, and the defendant's receipt of that price. We have already said that the time of the steamer's landing, even if proved to be seven o'clock, as stated by Innerarity, would not render more probable the commission of the fraud by the plaintiff and the Mumfords. It would show a better opportunity for Innerarity to perfect the scheme and put it in practical operation. But the consent and co-operation of these other parties would still be wanting.

We rest our decision broadly and squarely upon the fact that the only witness who sustains the defense is unworthy of belief, and that the parties whom he implicates deny the accusation, tell consistent stories of the transaction, do not differ from each other even in unimportant particulars, and their veracity, integrity, and honor are put beyond and above all question.

It is therefore ordered, adjudged, and decreed that the decree rendered by our predecessors and the verdict of the jury in the lower court are set aside, and the judgment of that court is avoided and reversed, and it is now ordered, adjudged, and decreed that the plaintiff have and recover of the defendant thirteen thousand six hundred dollars, with five per cent per annum interest from March 8, 1872, and three dollars costs of protest, and costs of both courts.

DISSENTING OPINION.

MARR, J. I concur in the opinion and conclusions of the majority upon the questions of fact; and I think the obligation of the Lottery Company to pay the prize drawn in this case is as complete as it can be in any case.

The Legislature has seen fit to incorporate the Lottery Company, and to grant it the monopoly of the lottery business and of the vending of

lottery tickets in the State ; but I do not understand that this law vests in the court any new powers or imposes on them any new duties.

The Code of 1825, article 2952, declared that "the law grants no action for the payment of what has been won at gaming, or by a bet, except for games tending to promote skill in the use of arms, such as the exercise of the gun, foot, horse, and chariot racing." And it keeps this species of gaming within bounds by empowering the judge "to reject the demand when the sum appears to him excessive."

Municipal corporations were authorized to license gambling-houses, and the act of 1831, which was intended to suppress gaming-banks, expressly excepted from its provisions the gaming-houses licensed in the city of New Orleans ; but, under the dominion of the Code, no action could be maintained for the recovery of money lost or won in these licensed houses.

The act of 1868, by which this Lottery Company was incorporated, does not profess to repeal article 2952 of the Civil Code ; and it is reproduced and re-enacted as article 2983 in the Revised Civil Code, adopted March 14, 1870.

Both these statutes are in force ; and they are not in conflict. The Lottery Company may pursue its business, and the law protects it in the enjoyment of its exclusive right by severe penalties which effectually prevent competition. Those who choose may buy tickets, and the Lottery Company may pay to winners the prizes drawn. But the Revised Civil Code, later in date than the Lottery Act, still declares that "the law grants no action for the payment of what has been won at gaming or by a bet ;" and the courts, in my opinion, are bound to observe and to enforce this law. Those who choose may take their chances at this business. The law does not forbid it ; but the law does forbid the judicial tribunals to enforce payment of what is won at "gaming or by a bet," and these terms in my opinion include the Lottery.

The record in this case vindicates fully the wisdom of the Code in refusing to grant an action in such cases ; and the parties should be left to settle their disputes and controversies touching the fairness of their play, and all kindred questions, without the intervention of the courts.

In my opinion the judgment should be for the defendant, upon the single ground that the obligation to pay is one for which the law grants no action.

STATE EX REL. ADRIEN BONNET VS. THE JUDGE AD HOC OF THE SECOND DISTRICT COURT, PARISH OF ORLEANS.

A third person, not party to a suit, may appeal from the judgment rendered in it, provided he proves, or it appears from the record, that he has a pecuniary interest in the suit, and is aggrieved by the judgment.

A PPEAL from the Second District Court, parish of Orleans. *Tully, J., ad hoc.*

Louque & Fernandez, for relator.

The judge *ad hoc* for himself.

The opinion of the court was delivered by

MANNING, C. J. The relator has applied for a mandamus directed to the judge *ad hoc* of the Second District Court for the purpose of compelling him to grant an appeal to this court from a judgment in favor of the plaintiff in the suit of J. L. Tissot vs. the succession of François Lacroix.

Relator was not a party to that suit, and his present demand is based upon his alleged right as purchaser of the interest of Edgard Lacroix in the succession of François, of whom Edgard is a forced heir.

The judge *ad hoc* denied the appeal upon several grounds, which are repeated in his answer to the rule to show cause why the peremptory writ should not issue. These are founded upon alleged defects in the title of the relator to the rights of heirship of Edgard Lacroix, arising from informalities in the proceedings under and by virtue of which the acquisition took place, and from non-compliance with essential prerequisites to the execution of a valid title.

One of these is, that the succession was represented in the suit by its administrator, who appeared by counsel, and the relator did not appear therein, nor did the heir, whose interests he now claims to own, and, being no party to that suit, that he had not the right of appeal.

The Code of Practice accords the right of appeal not only to those who were parties to the cause in which a judgment has been rendered, but also to third persons not parties to such suit, when such third persons allege that they have been aggrieved by the judgment. Article 571. This allegation was made by the relator, and if he were the transferee of the interest of the heir in the succession, he could exercise the same right that the heir could, and, we are not prepared to say the heir could not appeal. But to entitle a third person to appeal from a judgment between others he must show that he has a pecuniary interest and has been aggrieved, and where his interest is not apparent on the record, he will be required to show it. Succession of Henderson, 2 Rob. 391.

When the motion for an appeal was made by the relator in the lower

State ex rel. Bonnet vs. Judge *ad hoc* of the Second District Court.

court, the parties to the suit denied that he had any interest, and upon the issue thus made much testimony was received, and the judge denied the appeal because that evidence showed that the succession of François Lacroix is insolvent, and, further, because the relator's bid for the interest of Edgard Lacroix was \$667, which he did not pay in cash, but only a small portion thereof, to satisfy costs, retaining the residue and applying it to the partial satisfaction of his judgment; and, yet further, because the certificate of mortgages against Edgard Lacroix exhibited more than fifty thousand dollars of mortgages antecedent to the judgment of relator.

The evidence sustains these objections of the judge and justifies his refusal of the appeal.

The succession of François Lacroix being insolvent, the heir had no interest in it, and the purchaser of Edgard's heirship must have bid a sum which would cover the mortgages antecedent to his own, and have paid his bid. He did not comply with the terms of the sale, and acquired no title. His motion for an appeal was, therefore, properly refused, and his application for the writ of mandamus is rejected at his costs.

No. 6628.

FRANK MAYEUR VS. B. BLOOMFIELD & Co.

When the exception filed by a defendant, is in substance an answer, and is referred by the court to the merits, the case is fairly at issue, and may be tried and adjudicated, without any further answer.

APPEAL from the Fifth District Court, parish of Orleans. *Cullom, J.*

Hornor & Benedict and *F. W. Baker*, for plaintiff and appellee.

A. & W. Voorhies, for defendants.

The opinion of the court was delivered by

MANNING, C. J. The defendants filed a plea of prematurity to the suit of plaintiff against them on a promissory note, which had matured on the eleventh of January, 1877. The suit was filed on the sixteenth of that month.

The ground of the plea is that the note was "for binding and ruling done by plaintiff for defendants, who were under contract with the State; and that it was agreed that plaintiff would wait for his payment until defendants collected the amount in question from the State; that defendants have unsuccessfully applied for such payment, and will comply with their contract with plaintiff as soon as the State shall have satisfied defendants' claim."

Mayeur vs. Bloomfield & Co.

This exception was referred to the merits and notice given to the defendants' counsel, who declined to participate in the trial. The note and protest were offered in evidence by the plaintiff, and he had judgment.

The defendants' counsel insist that the case should be remanded for a trial of their exception. They have had an opportunity to try it, and declined to do it. The reason assigned for their refusal is that there was no answer filed, no issue joined. The exception was in effect and substance an answer, and the lower court so treated it. There could not have been a more direct joinder of issue by any form of pleading.

The plaintiff has prayed damages for a frivolous appeal. His judgment was signed on the ninth of last month, and there has not been any unnecessary delay, and, though the defendants were in error in the matter of law, we are not prepared to say their appeal was frivolous in their own estimation.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be affirmed with costs.

No. 6656.

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STATE EX REL. ALLEN JUMEL, AUDITOR, ETC., VS. GEORGE B. JOHNSON.

The judge of a State court has jurisdiction to determine whether the party applying to remove a suit pending before him, to a circuit court of the United States, is one who is, under the act of Congress, *entitled* to remove the suit.

The *title* to an office can not be put at issue in a mandamus proceeding.

A mandamus suit in a State court is not removable to a Federal court on a plea, or allegation, which raises the issue of title to an office.

The right of removing a suit from a State, to a Federal court, is a matter reviewable by the Supreme Court of the United States, under a writ of error to this court.

A writ of error from the Supreme Court of the United States to this court, operating as a *supersedeas*, divests this court of all further jurisdiction of the case.

A PPEAL from the Fourth District Court, parish of Orleans. *Houston, J.*

H. N. Ogden, Attorney General, for relator and appellee.

John Ray and *Hugh J. Campbell*, for defendant.

The opinion of the court was delivered by

MANNING, C. J. Allen Jumel, the Auditor of Public Accounts of this State, alleges that George B. Johnson refuses to deliver to him the keys, archives, books, public records, and papers belonging to that office, and prayed and obtained a mandamus to compel their delivery, which was issued in the alternative form on the twenty-seventh day of April of the present year.

Before filing any answer, the respondent presented a petition for the

removal of the cause from the Fourth District Court of this city to the Circuit Court of the United States, and tendered a bond in accordance with the act of Congress of March 3, 1875. The judge refused permission to file the petition and bond, and a bill was reserved to his ruling.

The respondent's counsel argue before us that the reception of the petition for removal and accompanying bond was not optional with the judge to whom it was presented, nor was he at liberty to consider whether the allegations of the petition justified the transfer of the cause, but that the reception and filing of the petition was a matter of right of the respondent, and the transfer was compulsory as soon as it was filed. The position is broadly stated in their brief, that such filing *ipso facto* transfers the cause to the United States court, and that court alone can consider and determine whether the petition and bond are sufficient to authorize the transfer. The authority of Dillon is quoted as sustaining this position.

We can not approve it. The language of the act of Congress does not support it. That enactment is as follows: "That whenever either party * * entitled to remove any suit * * shall wish to remove such suit from a State court to the Circuit Court of the United States * * he may file a petition in such suit in such State court * * and shall make and file therewith a bond * * and it shall then be the duty of the State court to accept such petition and bond and proceed no further in said suit."

The duty of the State court is to accept the petition and bond, and to proceed no further in the suit, whenever a party thereto, who is entitled to remove it, shall present them. But what is the court to do when the petition and bond are presented by a party who is not entitled to remove the suit? And how shall the court discover whether its duty is to accept or reject the petition, to proceed with the cause or to stay proceedings, until it has ascertained whether the party presenting the petition and demanding the transfer is or is not entitled to remove it? The order of transfer presupposes an inquiry into and judicial determination upon the right of the party to remove the cause, and until that inquiry is made the State court can not know whether the applicant for the transfer is entitled to it, and until the court does know that fact it should not judicially determine that the transfer shall be made.

Upon the refusal of the court to permit the petition for transfer and bond to be filed, the respondent answered, setting up title to the office of Auditor, and averring that he was elected to that office on the seventh of last November, and was so declared by the returning officers, and was commissioned by the Governor, and has qualified, and has "acted as Auditor until about the twenty-fifth of April of the present year, when his office was taken forcible possession of by persons acting under the

authority of Francis T. Nicholls, Governor of the State of Louisiana, without any legal or rightful authority, by which unlawful acts he has been prevented from discharging the duties of his office." He specifically denies that the relator is the legal and rightful Auditor, and prays that the writ of mandamus be refused, and the suit be dismissed.

This presents distinctly the issue of the rightful title to an office, an issue which can not be tried in this form of proceeding. A mandamus will not issue to test the right to an office. That doctrine is coeval with the origin of the writ, and has often been applied by this court. *State ex rel. Vienne vs. Hyams*, 12 An. 719; *State ex rel. Sternberg vs. Lagarde*, 21 An. 18; *Hero's case*, *idem* 336. In *Sternberg's case*, where he alleged title to the office of sheriff and applied for the writ to compel his predecessor to deliver to him the room, keys, papers, records, etc., belonging to it, our immediate predecessors held that it was not the office was in dispute, the right to which could not be inquired into under an application for a mandamus, but it was the room, books, papers, etc., belonging to that office, and the court made the writ peremptory. And this ruling is founded upon the express provision of our Code which permits a mandamus to issue to a public officer to compel him to deliver to his successor the papers and other effects belonging to his office. Code of Practice, art. 833.

When the respondent, in his answer to the rule, presents an issue that is foreign to the use for which the writ may be invoked, he can no more be heard than a relator who shall seek to test the title to an office under the guise of a proceeding, the ostensible object of which is to obtain possession of the books and insignia of the office. Such is the dictum of a recognized authority on the subject: "But, if it be apparent to the court that instead of a proceeding whose object is only to get possession of the books and insignia of the office, the writ is invoked in reality to test the title to the office, and that the question of title is the real point in issue, it will refuse to lend its aid by mandamus." *High's Extraordinary Legal Remedies*, sec. 77. It is manifest then that the respondent can not put at issue the title of the relator to the office of Auditor in this proceeding.

We have postponed the consideration of the respondent's right to transfer the cause to the United States Court until now, because it was necessary first to determine what was the nature of the present proceeding, and to define the limits within which it could be used by either of the parties.

The right of transfer is founded upon the act of Congress which provides for the enforcement of the right of suffrage of colored persons, wherein it is enacted that "whenever any person shall be defeated or deprived of his election to any office * * * by reason of the denial

to any citizen, who shall offer to vote, on account of race, color, or previous condition of servitude, * * * such person may bring any appropriate suit or proceeding to recover possession of such office," and upon the other statutes which specify the classes of cases that are removable. A basis is laid for the application, by averments in the petition for removal that at least ten thousand colored citizens who offered to vote at the election of seventh November, 1876, were denied the right to vote on account of their color and previous condition of servitude, and that by reason of such denial, the respondent is deprived of his office.

The issue thus attempted to be raised in this petition for removal is identical with that presented by the answer, viz.: the title to the office of Auditor, and we have seen that under no circumstances can the title to an office be inquired into by a mandamus. Since then the right to remove the cause is claimed because of the assumption that the proceeding has a quality which it has not, it follows that the refusal to remove was proper.

We shall make the writ peremptory, and in doing so it is obvious that we recognize the relator as the Auditor of Public Accounts of this State. There are persons and facts of which a court takes judicial cognizance. This court takes cognizance of the fact that Francis T. Nicholls is the Chief Executive of this State, and regards his commission as furnishing a *prima facie* title to an office. We take judicial cognizance of the persons who hold the principal offices of State—of the Attorney General who represents the State in this proceeding—of the relator, as the Auditor. Government could not exist, under our form, without thus taking certain things for granted. Government must have a beginning, and it is an elementary and a necessary principle, that the courts, constituted by and organized under a government, must recognize the authority under which they act.

But this does not prevent the respondent from inquiring into the rightfulness of the relator's title to his office in that form of procedure which the law has designated for that purpose. There is a mode provided by law, and indicated as the special machinery to be used by one who complains that another has intruded into his office. Such inquiry can not be provoked by a respondent in an answer to a rule why a mandamus should not issue, nor could the relator have demanded an adjudication of his own title by invoking the writ for that purpose.

Let the peremptory writ issue, commanding the respondent to deliver to the relator the keys, archives, books, records, and papers belonging to the office of Auditor of Public Accounts of the State, and it is further ordered and decreed that the relator have and recover of the respondent the costs of both courts.

ON THE RULE TO EXECUTE JUDGMENT.

SPENCER, J. A writ of error having been granted, with supersedeas, from the decree in *Jumel vs. Johnson*, this court is divested of all jurisdiction and control of the case, or of any part thereof. That writ emanating from the Supreme Court of the United States, directs this court to send up the record, and forbids, in effect, the execution of our decree. We are bound to respect and obey this mandate.

The defendant has clearly the right to have the question of removal passed upon by the Supreme Court of the United States, as it is a right claimed under an act of Congress, and denied to him.

If he had the right to remove, *any further proceeding* in the court below or in this court, *after his application to remove was duly made*, is *coram non judice*, and null and void.

This fact shows that the question to be decided by the Supreme Federal Court underlies every part of this cause, for *if there was error* in refusing the removal, *there is no decree* of this court or of the court below *to be executed*.

The motion and rule is discharged and denied.

CONCURRING OPINIONS.

MARR, J. By timely application in the court below, the respondent sought to have this cause removed into the Circuit Court of the United States under the act of Congress approved third of March, 1875.

The case, in my opinion, was one of which the circuit court could not have taken jurisdiction, either by original process or by removal, and I concurred in the decree of this court affirming the judgment of the court below refusing to allow the removal.

The respondent applied for and obtained a writ of error, to have the decree of this court reviewed by the Supreme Court of the United States, and he gave bond, which was satisfactory to and was approved by the Chief Justice of this court, to operate as a supersedeas.

The Attorney General now moves to have the decree of this court sent down to the district court in which the proceeding originated to be executed. In my opinion, this can not be done.

With a perfect conviction that there is no error in the decree of this court affirming the judgment of the court below, it is obvious that this is the precise question to be determined by the court having supervisory jurisdiction, the Supreme Court of the United States, and, from the moment the writ of error was allowed and the bond approved, this court ceased to have jurisdiction of the cause for any purpose whatsoever.

There is, in my opinion, but one Federal question involved in this case,

but one question which the Supreme Court of the United States can take cognizance of, and with respect to which this court is subordinate to the Supreme Court of the United States, and that is, whether the respondent was entitled to have the cause removed from the State court into the circuit court. This question depends purely and exclusively upon the laws of the United States. The respondent claimed a right under the laws of the United States, the right to have the cause removed into the circuit court; and he claimed exemption under the laws of the United States from the jurisdiction of the State court. This court, the tribunal of last resort under the laws and constitution of the State of Louisiana, decided that he was not entitled to the right and exemption asserted and relied upon by him. If this decision is not subject to revision by the Supreme Court of the United States, it is not possible to imagine what decision of a State court of last resort would be subject to appeal or writ of error.

So far as the right to the benefit of the writ of error is concerned, it is not a question as to whether the State court decided correctly; the whole inquiry is limited and within a very narrow compass: Did the court pass upon and determine a question arising under the laws and constitution of the United States? Did the party demanding the writ of error claim a right or exemption under the laws and constitution of the United States; and was the decision against the right or exemption thus asserted and claimed?

It is the law of the United States alone which gives the right of removal; it is the law of the United States alone which exempts the party who claims the right of removal from the authority and jurisdiction of the State court, and in order to determine whether the State court had jurisdiction it was necessary to decide whether the asserted right of removal, the exemption claimed, actually existed in the given case under the laws and constitution of the United States, and the State court of last resort having decided that the right and exemption did not exist, there is no remedy or relief for respondent except by resort to the Supreme Court of the United States, properly vested with jurisdiction in all such cases.

This court may have decided correctly; if so, the decree will be affirmed by the Supreme Court of the United States. This court may have erred; if so, the court below was without jurisdiction, this court was without jurisdiction, and the whole proceeding was *coram non judice*, and absolutely void. And yet this error can be corrected only by the Supreme Court of the United States.

Conceding that is a proper case for writ of error, it is urged that the judgment may be executed provisionally, and that the public interest demands that it shall be executed provisionally. But this proposition is not tenable. The writ of error does not necessarily operate as a super-

sedes, but if it is taken, and sufficient bonds given within the time limited by the laws of the United States, the supersedeas is a mere matter of course, a necessary legal consequence.

When the respondent had obtained an order of appeal to this court, and had given the requisite bond, the court below was divested of jurisdiction, and this court would have interfered, by prohibition, if necessary, to prevent any attempt to execute the judgment appealed from until the matter could be heard and determined in this court. Why? Because it was the right of the respondent to appeal; it was his right to make that appeal suspensive; and the appellate court was bound to protect him in the enjoyment and exercise of that right. By what process of reasoning can it be shown that the appeal which vested jurisdiction in this court necessarily suspended the execution of the judgment, if the writ of error which vests jurisdiction in the Supreme Court of the United States, leaves this court free to order the execution of its decree?

Appeals and writs of error are very frequently frivolous; they are often taken merely for the purpose of delay, without a hope of ultimate success. Great inconvenience, loss, and injury may be occasioned to individuals and to the public by improper resort to appellate tribunals, but if the party cast in a suit chooses to invoke the aid of an appellate court having jurisdiction, his right to do so can not be denied and should not be abridged, and it is better for individuals, better for the public, to suffer the inconvenience of delay and temporary suspension in the enforcement of a right than to incur the risk of depriving one of the right to have his complaint heard and determined in the highest judicial tribunal having jurisdiction.

There may be some question as to whether this is "a *suit* at law or in equity," within the meaning of the act of Congress. In my opinion it is a *suit* at law. But if I had any doubt on that point, I should give the respondent the benefit of that doubt, and I would prefer, in any case, to err in favor of the right of appeal rather than risk doing the wrong of refusing that right improperly.

I concur in the opinion and conclusions of Justice Spencer that the rule should be discharged.

EGAN, J. The writ of error having been granted, and a sufficient bond given to operate a supersedeas under the act of Congress, I am unwilling, in this case, to disregard it by making the rule absolute. The considerations of public policy and State necessity which may operate in such cases to prevent interference through the Federal courts with the operations of any department of a State government are certainly very grave and entitled to due weight, but should probably be taken into ac-

State ex rel. Jumel vs. Johnson.

count before granting the writ of error, a matter with which this court, as such, has nothing to do. In case of doubt, I should always incline to give every litigant the benefit of every legal remedy. I think, however, that the tendency to trench upon the jurisdiction of the State courts latterly displayed, and to transfer causes with too much facility, should not be encouraged by us. That it has not been in the present case is manifest from our decree making the mandamus peremptory. Neither am I prepared to say that *in a case which in itself involves no Federal question* any party may, by mere frivolous application for removal from a State court to a Federal court, entitle himself, as a matter of right, to a writ of error for that reason. By reason, however, of the present attitude of this case, and of the circumstances attending it, I concur in the discharge of the present rule.

No. 6624.

SUCCESSION OF HUGH McCLOSKEY. HUGH McCLOSKEY vs. J. D. MARTIN
AND RICHARD McCLOSKEY, EXECUTORS.

A legatee who has accepted, and entered on the enjoyment of his legacy, can not afterward demand that the terms and conditions of the legacy shall be changed.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J.*

T. W. Collens and James Timony, for plaintiff and appellant.

E. Bermudez and T. Gilmore & Sons, for defendants.

The opinion of the court was delivered by

DEBLANC, J. Hugh McCloskey, an uncle of plaintiff, died in this city, leaving a last will containing several legacies, one of which to his nephews, Hugh, the plaintiff, and George, his brother. The legacy to his nephews was, partly, "the right to rent at five hundred dollars per month some property belonging to him, the testator."

The will does not fix the time during which that right may be enjoyed.

On the twenty-second of December, 1873, Hugh McCloskey applied to the Second District Court for the purpose of having said disposition carried into effect. His application was granted, and the executors of the last will of his uncle ordered to lease him the property for the space of four years.

On the twenty-seventh of January, 1874, in accordance with the disposition of the will and the judgment of the court on his own application, the executors appeared before a notary, and leased unto the said

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Hugh McCloskey, for and during the term of four years, a house and its appurtenances (that designated in the will).

This lease was made for and in consideration of forty-eight notes of each five hundred dollars, subscribed and delivered by plaintiff to the executors.

He now prays that said lease be abrogated, and the rent of the house reduced to two hundred and fifty dollars per month, until a change in the market value of rent may warrant an increase or another reduction thereon.

The district judge rejected plaintiff's demand, and we are asked to reverse his decision, to annul the judgment authorizing the executors to rent and fixing the term of the lease, to avoid the contract of the twenty-seventh of January, 1874, and replace it by another, a different contract.

Plaintiff bases his demand on the ground that he signed the lease and the notes in error of his rights under the will; that his uncle intended to confer on him an advantage, a benefit, and that the rent, if continued at five hundred dollars, would be a burden.

When the will was written, when it was probated, when the legacy was accepted, that legacy was an advantage, a benefit. The contract, intended by the deceased as a favor to his nephew, was, at the request of the nephew, passed by the executors of the last will. Can it be canceled without the consent of the legatees and creditors of the deceased?

It is not, in reality, an abrogation or dissolution of the lease that plaintiff is asking; nor is it a reduction of the price first agreed upon, for any of the special causes fixed by our legislation and jurisprudence, His object is to so graduate the rent, so conform it to the value of rent and property, that at all times and under all circumstances, whatever may be the changes and fluctuations in the value of rent or property. the testamentary disposition in his favor shall remain an advantage, a benefit, and shall never be a burden.

Was and could the legacy have been accepted or rejected conditionally? It neither was nor could have been so accepted. A succession can be accepted under benefit of inventory, but when finally accepted or renounced, no condition can be attached to either the acceptance or renunciation. Our Code so provides, and in terms as clear as positive; otherwise the heir or legatee would invariably accept for so long only as the succession and legacy would remain an advantage, and as invariably renounce, until so long only as the succession or legacy would be a burden. That is not the law. R. C. C. art. 1016.

Can the heir or the legatee dispute the validity or reduce the effects of his unqualified acceptance, under the pretext of lesion? He can not. Suppose that the lease, in this case, instead of being allowed for the space of four years, on the condition fixed by the testator, had been

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allowed for ten years, and that, during nine years and nine months, the lease on that condition would have proven a considerable advantage to the legatee, could he consistently contest the payment of the rent due for the last month of that long term on the ground now urged by plaintiff? Certainly not. R. C. C. art. 1009.

What is a legacy? An offer from the dead to the legatee to take what he intended to give. That offer the legatee can refuse or accept. If he accepts, it must be on the condition fixed by the deceased; those conditions, whatever they may be, he can not change before, and much less after, the acceptance. If to-day the legatee takes a horse valued by the testator at five hundred dollars, and worth that amount, and, shortly after, it becomes affected with the glanders, could he justly claim the five hundred dollars on the ground that the testator intended that he should have and preserve the equivalent of that sum? He would be told: it was after it was delivered to you, after it had become yours, that the object of the legacy lost its value, and that loss you alone must bear, as you alone, and not the heir, would benefit by an increase in the value of said object.

The inference is indisputable, the testator intended to confer an advantage, and not to impose a burden. With that view he fixed the rate of the rent; and, as to that clause, his last will was carried into effect. What he had not done the court did; with the consent of every one of the interested parties the court fixed the term of the lease, and plaintiff has accepted, taken, and enjoyed at the rate and on the condition fixed. We can neither add to nor change the condition settled by the will, the decree of the court, and the contract of the parties.

There is no error in the judgment of the lower court.

It is therefore affirmed with costs.

No. 6645.

SUCCESSION OF PAULINE MENENDEZ.

The judgment of a court removing an under-tutor can not be *suspensively* appealed from. Such a judgment must be provisionally executed.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J.*

W. E. Murphy, for plaintiff and appellee.

E. Sabourin, for defendant.

The opinion of the court was delivered by

DEBLANC, J. I. M. Tupery, the grandfather of the children of Pauline

Succession of Pauline Menendez.

Menendez, sues for the removal of Fernandez I. Carbajal, as under-tutor of said children, on the ground that he is aiding their tutor in an attempt to despoil them. There was judgment removing said under-tutor, and appointing, in his stead, the grandfather, the said Tupery. From that judgment Carlos Menendez, the tutor, and the dismissed under-tutor have prayed for and obtained a suspensive appeal.

In the lower court, a motion was made to dismiss this appeal, for the reason that, under the law, the execution of such a judgment as that rendered in this case can not be suspended by an appeal. That motion is urged here, and it must prevail. There are judgments which are to be provisionally executed, notwithstanding and without prejudice to the right of appeal. Among them is the appointment, and—of course—the removal of tutors and under-tutors. C. P. 580, 1059.

Even the already appointed tutor, who has excuses to offer against his appointment, is bound to provisionally administer as such during the pendency relative to the validity of his excuses. R. C. C. 300.

Appellant relies, we presume, on the fact that the Code of Practice does not, in express terms, include in the list of judgments to be so provisionally executed, those that may be rendered against under-tutors. They are, undoubtedly, of that class, as a final decision in such cases may be retarded for a long time, and occasions might arise during the pendency of the litigation, which would require the interference of an under-tutor.

This is not all: were a dative tutor appointed to replace an excluded or removed natural tutor, the decree ordering the appointment and removal would be provisionally executed against the parent. The under-tutor can not justly claim a privilege denied to the father: the causes of incapacity, exclusion, and removal, with but two exceptions, which apply to the tutor, apply likewise to the under-tutor, and the effects of a decree pronouncing the removal are necessarily the same. C. C. 306.

It is therefore ordered, adjudged, and decreed that the appeal taken and granted in this controversy is maintained as exclusively a devolutive appeal.

Haeberle vs. Barringer.

No. 2847.

JOHN HAEBERLE VS. JOHN L. BARRINGER ET AL.

A suit against a ship, or other vessel, and her captain and owners, without naming the latter, accompanied by a provisional seizure, or sequestration of the vessel, is an action *in rem*, and of such an action, the State courts have no jurisdiction. Only the admiralty courts have jurisdiction of suits *in rem* against vessels. In a *personal* suit against the captain, or owners of a vessel, the vessel is subject to attachment, or any other conservatory writ, that any other species of property is.

A PPEAL from the Second Judicial District Court, parish of Jefferson.
Pardee, J.

Egan & Whittemore, for plaintiff and appellant.

Huft and *R. King Cutler*, for defendants.

The opinion of the court was delivered by

MARR, J. Barringer brought suit in a justice's court of the parish of Jefferson against the "steamboat Jatau, captain, and owners," and caused the boat to be provisionally seized. A judgment was rendered in favor of the plaintiff, from which the owner of the Jatau took an appeal to the parish court. This appeal was finally dismissed for want of prosecution, and execution issued, under which the constable seized the Jatau. This seizure seems to have been released, and Haeberle, the owner of the boat, filed his petition in the Second Judicial District Court in the parish of Jefferson, alleging that the judgment was a nullity; that the *feri facias* was also a nullity; that the seizure was illegal; that Barringer and the constable, Joachim, threatened to seize the boat again on her return to port; that the boat was worth six thousand dollars; and that the illegal acts of Barringer and Joachim had caused damages to Haeberle for which he claimed six hundred dollars. He also prayed that they be perpetually enjoined from seizing said steamboat or any other property of Haeberle under the said illegal writ.

The judgment of the court below dissolved the injunction with fifty dollars damages and dismissed the petition, and Haeberle appealed.

We consider it well settled that a steamboat or a ship can not be proceeded against in a State court in the form in which the suit was brought and prosecuted in the justice's court. A creditor having a claim of any nature whatsoever against the master and the owners of a ship or other vessel may bring his suit *in personam* against his debtors; and he may avail himself of any conservatory process allowed by the laws of the State to secure and enforce his demand. Where the defendants are non-residents, for example, the creditor may obtain a writ of attachment and may cause to be seized any property whatsoever belonging to his debtor, whether it be ship or other vessel or some other thing liable to seizure. So, where the debt is one which creates a lien and privilege, the creditor may cause a writ of provisional seizure or of sequestration

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to issue, as the one or the other may be appropriate, and the property on which he claims the lien or privilege may be seized under such writ, whether it be ship or other vessel or any other thing whatsoever. In all such cases the debtors are sued by name, sued in person, and the writ is merely auxiliary to hold the property upon which the lien or privilege exists until judgment can be obtained *in personam*, and the lien enforced by seizure under *feri facias*.

But a suit against "the steamboat Jatau, captain, and owners" is not a suit *in personam*, since no person is named and no person could be condemned. The provisional seizure in such case is a proceeding *in rem* against the property seized, which our law does not permit except in those cases in which the thing upon which the lien is claimed has either been lost or abandoned by the owner, or the owner is either unknown or absent, and these requisites must be made to appear by proper affidavit.

The creditor may sue the captain and the owners of the vessel, and may seize the vessel provisionally, but he must name and cite by name the persons whom he charges as captain and owners, otherwise his proceeding is *in rem* to enforce a lien and privilege on the vessel.

The jurisprudence of the Supreme Court of the United States and of this State has settled conclusively that such proceedings *in rem* against a ship or vessel can not be had in a State court, and that it is only in the admiralty that liens and privileges on ships and vessels can be enforced by proceeding *in rem* in the name of and against the vessel itself. See the *Moses Taylor*, 4 Wallace; the *Hine*, 4 Wallace; the *Belfast*, 7 Wallace; and *Brown vs. Matanzas*, 19 An. 384.

In this latter case the suit was brought against the "steamship Matanzas, captain, and owners," and the vessel was sequestered. The distinction in all such cases is this: A creditor having also a lien and privilege on the vessel may sue his debtor in any State court having jurisdiction of the person and the amount, and he may attach the vessel or seize it under any conservatory process allowed by the local law, but if he wishes to proceed against the vessel by name and to seize it *in limine* he must sue in the admiralty, and the State courts are without jurisdiction.

This is not a suit for the nullity of a judgment. The plaintiff alleges the nullity and the illegal seizure and the threatened seizure of his property under execution issued on that judgment. For the wrong thus done he claims six hundred dollars damages, and he also prays to be protected by perpetual injunction. The jurisdiction of the district court can not be seriously questioned. The boat may have been detained in port by the seizure, may have lost freight and passage money which would have otherwise been earned, and the plaintiff might have

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been able to prove the full amount of damages sued for. At any rate, the amount sued for is sufficient, and we are to look to that amount to determine the jurisdiction.

The judgment of the justice's court was void for want of jurisdiction, and it acquired no additional force or validity by the dismissal of the appeal to the parish court.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed; that the injunction as prayed for in plaintiff's petition and as originally granted *in limine* be reinstated and be made perpetual; and that the appellees pay the costs in both courts.

No. 6430.

SUCCESSION OF C. E. MARC.

The surviving widow, although a former concubine, and only married a few days before her husband's death, is entitled to all the rights enjoyed by any other widow, under the homestead law.

The widow's claim under the homestead act ranks all privileges, except that of the vendor.

If the proceeds of the movables and unmortgaged property of a succession do not suffice to pay off its privileged debts, those debts must be first referred for payment to the proceeds of its property incumbered by the *youngest* mortgage.

The vendor's privilege is only operative as to third persons, from the moment of its registry.

The vendor's privilege will not take rank over a mortgage recorded before its own registry, unless its own registry was made on the day of the sale.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J.*

A. J. Villere and *M. B. Dubuisson*, for executor and appellee.

J. Meunier and *Ed. Bermudez*, for opponents.

The opinion of the court was delivered by

MANNING, C. J. The sole contest in this case is between the creditors of the deceased, each of whom has a mortgage.

Soye, the older creditor, obtained executory process, under which the property specially mortgaged to him was sold, and it did not realize sufficient to pay his claim, after the costs of his process and the taxes were satisfied.

Gayarre's mortgage was on another property, and was subsequent in date to Soye's, and he had also the vendor's privilege upon it, retained in the same act which recited the mortgage. The sale of that piece of property was likewise insufficient to pay the costs, taxes, and his debt. The executrix has charged the general and special privileges, viz: the

29	412
49	630

29	412
108	548
2108	545

29	412
120	738

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funeral charges, and those of the last illness, and of law, and the widow's portion of one thousand dollars, to the fund derived from the sale of the two mortgaged properties indifferently, and they consume the whole of both.

Opponents deny that the widow is entitled to the gratuity of one thousand dollars under the act of 1852, because she was the concubine of the decedent until within twelve days of his decease, when their marriage took place, while he was in the presence of death, and without issue born of their previous concubinage.

The act of 1852 gives to the widow who is in necessitous circumstances the sum already mentioned, without qualifying her right to receive it by the condition that her previous life should have been blameless, or by limiting its operation to those whose married life should have lasted a specified time. Revised Statutes of 1870, section 1693. It is argued by one of the opponents that an interpretation of the statute which permits the widow of Marc to partake the beneficence provided by it, would be offensive to our moral sense, and that it could not have been in the contemplation of the Legislature to place a woman, who has thus disregarded religious and social duty, upon the same plane with the respectable and bereaved widow, whose condition attracted the regard and provoked the compassion of the law-maker.

It is very certain, however, that the law has not attached qualifications, nor imposed conditions upon the recipients of this legislative bounty, such as we are asked to supply and enforce in the present proceeding. Should we attempt to do so, omitting any mention of our want of authority, we must arrange this description of persons into classes, separated from each other by the purity or impurity of their ante-nuptial lives, or by the longer or shorter duration of the marriage which preceded the widowhood.

There are conditions, however, imposed by the statute which the claimant of this bounty must fulfill. The widow must be in necessitous circumstances, and the present claimant is indisputably in that condition. The sum to be received from the succession of her deceased husband must be such, as added to the amount of property owned by her, will make one thousand dollars. She had no property, but the rents of the mortgaged property occupied by her since her husband's decease are \$325, and are deductible from her portion under the act. Succession of Drum, 26 Annual, 539. The residue is to be paid in preference to all other debts, except those for the vendor's privilege, and expenses incurred in selling the property, but the widow is entitled to the usufruct only of the sum specified in the act if there be children.

The opponent, Gayarré, had a vendor's privilege on the property sold under his mortgage, and claims its exemption from the widow's allow-

ance, which is opposed by Soye for an alleged want of seasonable registry of the privilege. The copy of the act of mortgage contains also the retention of the vendor's privilege, and it was recorded in the mortgage office on the fourth of April, 1874, a few days after its execution. It is not pretended that any other mortgage exists, or existed on that property, and the objection of want of registry is therefore untenable as between these creditors.

Two rules relating to the rank of privileges and to the fund out of which they are payable, are well established. One is, that when the movables and unmortgaged property are insufficient to pay the privileges, they must be paid out of the fund arising from the sale of the property covered by the youngest mortgage, and, that being insufficient, the residue must come out of that next in age. Devron's case, 11 Annual, 482; Succession of Cerise, 24 Annual, 96; Succession of Rousseau, 23 Annual, 1.

The other is, that the destitute widow's portion primes all privileges created previous to the death of the party, except that of the vendor, but that it yields to funeral expenses, expenses of last illness, and law charges growing out of the administration and settlement of the succession. Foulkes's Succession, 12 Annual, 537; Quertier vs. Hille, 21 Annual, 429.

Applying these rules to the case at bar, the widow of Marc, whose portion is reduced to six hundred and seventy-five dollars by her previous receipts from the succession, must be paid that residue out of the Soye-mortgage fund, and the general privileges, which are not satisfied by the sale of the movables, must be paid by the Gayarré mortgage as the least ancient.

The taxes and costs of sale of the Soye-mortgaged property are nearly one half of the sum at which it was adjudicated, and the residue is insufficient to pay the widow's portion, but the unpaid part of that residue can not be charged against the property affected by the vendor's privilege.

The taxes and costs of sale of the Gayarré-mortgaged property are more than half of the sum realized by its sale, and that residue must bear the burthen of such part of the general privileges as are not satisfied by the sum derived from the sale of the movables.

Where the husband dies without descendants, as in this case, the necessitous widow is not required to give security. She does not take the usufruct only of the sum secured to her, but its full ownership. Succession of Hunter, 13 Annual, 257; Yarborough's Succession, *idem* 378.

The reductions and alterations made by the lower court in the tableau are approved, and the funds must be distributed as directed by that court, except where amended or reversed by this decree, and it is ac-

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cordingly so ordered, the costs of appeal to be paid by the two opponents and appellants in equal parts.

ON REHEARING.

The opinion of the court was delivered by

MANNING, C. J. A rehearing of this cause has been granted on the application of the opponent, Charles Gayarré. The grounds urged by him for error are, that we subjected the fund, derived from the sale of the property upon which his vendor's privilege rested, to the payment of the general privileges, when these latter should have been charged to the Soye fund.

Upon a review of our opinion and decree, we find there was error in holding that his privilege existed, or could be enforced. A material alteration has been effected in the law applicable to this question by a radical change of two articles of the Civil Code.

Article 3240 formerly read as follows: "The privileges enumerated in the two preceding articles are valid against third persons from the date of the act, if it has been duly recorded, that is to say, within six days of the date," etc. It is numbered 3273 in the revisal, and reads: "Privileges are valid against third persons from the date of the recording of the act or evidence of indebtedness as provided by law."

Article 3241 formerly read thus: "When the act on which the privilege is founded has not been recorded within the time required in the preceding article, it shall have no effect as a privilege, that is to say, it shall confer no preference on the creditor who holds it, over creditors who have acquired a mortgage in the mean time, which they have recorded before it; it shall, however, still avail as a mortgage, and be good against third persons from the time of its being recorded."

That article is numbered 3274 in the revisal, and reads: "No privilege shall have effect against third persons unless recorded in the manner required by law in the parish where the property to be affected is situated. It shall confer no preference on the creditor who holds it over creditors who have acquired a mortgage, unless the act or other evidence of the debt is recorded on the day that the contract was made."

The privilege mentioned in article 3238 (new number 3271), is one of those referred to: "The vendor of an immovable only preserves his privilege on the object when he has caused to be duly recorded at the office for recording mortgages, his act of sale in the manner directed hereafter, whatever may be the amount due him on the sale."

Formerly, and under the Code of 1825, the vendor of an immovable preserved his privilege if he had the act evidencing it recorded within six days of its date. Now, by the alteration, or rather substitution of a

new article, that privilege is preserved against third persons only from the date when the act is recorded. As against mortgages recorded anterior to the registry of the privilege, this latter has effect as such only when recorded on the day of the date of the contract creating it.

The application of these new articles of the Code to the present case sensibly affects the opponent, who claims exemption from contribution to the general succession privileges by reason of his holding a privilege superior to them. We are compelled to hold that he has no privilege whatever, as against third persons, since the act which conferred upon him, or preserved, the vendor's privilege, was not recorded upon the day the sale was made. And this is what was meant by the counsel of Soye when the loss of the privilege was attributed to want of *seasonable* registry.

The act of privilege not having been recorded on the day of its execution, the privilege itself was lost as to third persons, and Soye is a third person in this proceeding where the subjection of the two funds to the payment of the succession privileges turns upon the question of privilege *vel non*. Gayarré's mortgage was not lost. It was good from the day it was recorded, but it was junior to Soye's, and a senior mortgage can not be required to contribute to the payment of privileges of a succession until the junior mortgages are exhausted. Therefore

It is ordered, adjudged, and decreed that so much of our former decree as subjected the Soye-mortgage fund to the payment of the unpaid residue of the widow's portion, is set aside, and that after the sum derived from the sale of the movables is exhausted, the residue of the succession privileges be first charged against the junior mortgage fund of Charles Gayarré, and not until that is exhausted, can any portion of these privileges be charged against the more ancient mortgage fund of Soye, the costs of this appeal to be paid by the opponent, Gayarré.

No. 5981.

CITY OF NEW ORLEANS VS. L. MADISON DAY.

Former statutes, providing for the collection of "back taxes," not being in conflict with act No. 96 of the extra session of 1877, which only refers to future taxes, are not repealed by it.

The assessment of a tax against an individual, creates, not merely a lien on his property, but also a personal obligation to the full amount of the tax.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J.*

Samuel P. Blanc, Assistant City Attorney, for plaintiff and appellee.
Bentick Egan, for defendant.

Succession of Marc.

The opinion of the court was delivered by

SPENCER, J. This is a suit to recover city taxes on three pieces of property in New Orleans.

The property is described on the assessment roll as follows:

First piece.—“Square No. 227, Common, Baronne, Gravier, and Carondelet streets. Name of person—L. Madison Day. Streets—Corner Carondelet and Baronne. No. of lot—One. Measurement—22 by 119.”

Second piece.—“Square No. 45, Perrier, Prytania, Nashville Avenue and Eleanor streets, Hurtville.—Name of person—L. Madison Day. Streets—One square. Measurement—240 by 300.”

Third piece.—“Square No. 63”—giving in a similar way its bounds and measurements.

In these assessments, in a column marked “value of real estate,” we find entered in figures, as follows: For first piece “35,000,” for second piece “1000,” and for third piece “12,000.”

The defendant answering, contends that these assessments are void; first, because there is no sufficient description of the property, and, second, because the value, as denoted by the figures, is uncertain and unmeaning, having no indications of what is meant by the figures used. As regards the first objection, it is so manifestly unfounded as to need no comment. The number and bounds of the squares, the number and measures of the lots are given. We are at a loss to conceive what more could be stated in order to describe the property. The objection that in giving the dimension or measurements, it does not appear whether the figures used mean feet, yards, or miles, is frivolous.

We think the second objection, that the figures used to state the valuation, do not indicate whether they are dollars or cents, equally without force. We state *values* in this country in dollars and cents. Cents are expressed in two ways, either by a decimal point before them, or by a fraction of one hundred. As the figures used in these assessments either mean dollars or cents, and as they manifestly *do not indicate* cents, they stand for dollars. Besides, nobody ever speaks or writes thirty-five thousand cents; they say or write three hundred and fifty dollars.

The authorities cited by defendant from the Tennessee and Illinois reports are inapplicable to his case. They refer to cases where the property had been sold, on defective rolls, without previous trial and judgment. Besides, the decisions of the courts of our sister States upon their several local revenue laws do not carry the weight and authority here that they would have, and no doubt deserve, when discussing subjects less local and peculiar.

If the figures used under the head of “valuation” did not mean dollars, the defendant had ample opportunity to have made it appear by

Succession of Marc.

proof, and he should have done it, for taking a common-sense view of the tax-roll the presumption was clearly against him, and we think the court fully justified in interpreting the figures as it did.

This suit was brought against the defendant in November, 1874, for the taxes of that year. On the fifth of that month he filed his answer, and on the fourth of December following his supplemental answer. On May 19, 1875, after evidence introduced and argument, the court gave judgment for plaintiff, and defendant appealed. The defendant now insists that however right the judgment against him may have been it must now be reversed, and this suit be dismissed, because the act No. 96 of the extra session of 1877 has provided a *new mode* of collecting taxes, and that all laws providing a different mode are repealed thereby. It may be true that the Legislature has provided a new mode of collecting taxes as stated, but it does not follow that that mode is exclusive, especially as relates to back taxes. We understand that the assessment of a tax against an individual creates a personal debt against him, as well as a lien against his property. If the property of the debtor subject to the lien be from any cause insufficient to pay the tax, he is *personally* bound and liable as well for the whole tax as for any deficiency thereof, and if it be a debt due by him *personally*, we know no law or reason why he may not be sued in the courts by the corporation to whom he is indebted and condemned to pay. We understand the act No. 96 to provide a speedy remedy as *against the property itself*, but do not see that it takes away the right of the city to proceed in the courts to enforce the *personal* obligations of its debtors, and incidentally its liens on their property. Be this as it may, the law by its terms makes no *reference to back taxes*, and seems to provide *for the future*; and so far, therefore, as relates to the collection of *back taxes*, the remedies provided in *former statutes* are not necessarily "in conflict" with act No. 96, and therefore not necessarily repealed by it. We would be very loth to hold to a construction of act No. 96 which would work so manifest an injustice and injury to the public interests. As we have seen, there is no necessary conflict, and, therefore, as we hold, no repeal of the right of the city to proceed with her suits pending for delinquent taxes of past years.

It is therefore ordered and decreed that the judgment appealed from be affirmed with costs of both courts.

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No. 6417.

LAFAYETTE FIRE INSURANCE COMPANY VS. HEIKE EIBEN REMMERS.

The Legislature can not change the judicial districts pending the existing terms of office of the district judges.

When a portion of one parish, situated in a certain judicial district, is annexed by the Legislature to another parish, situated in a different judicial district, it will become a part of the latter judicial district, on the expiration of the existing terms of office of the district judges, unless the Legislature shall otherwise provide.

A PPEAL from the Fifth District Court, parish of Orleans. *Cullom, J.*

Hornor & Benedict, for plaintiff and appellee.

N. Commandeur and Merrick, Race & Foster, for defendant.

The opinion of the court was delivered by

EGAN, J. This suit is to enforce *via ordinaria* a mortgage and for personal judgment against the defendant, a resident of the Sixth Municipal District of New Orleans, where also is situated the mortgaged property. The defendant excepts to the jurisdiction of the Fifth District Court. It is urged *per contra* that he is subject to that jurisdiction both by reason of his domicile and the property mortgaged being situated in the parish of Orleans. The Sixth Municipal District is part of that territory, formerly belonging to the parish of Jefferson, which was annexed to and made part of the parish of Orleans by act No. 71 of the Legislature, approved March 23, 1874, which specially provides that the territory so annexed "shall be and remain and constitute a part of the Second Judicial District of the State," of which the parish of Jefferson was a part at the time. Our predecessors more than once held act No. 71 to be constitutional, and we are not prepared to depart from their conclusions, and there has been no subsequent inconsistent legislation. So late as November last, in the case of *Harrison vs. Carondelet-Street Railroad Company*, *Collins, Garnishee*, Opinion Book 45, p. 584, they held that the garnishee, under judgment and *feri facias*, who resided in Carrollton, was within the limits of the Second Judicial District of the State, and could not be called to answer before the Fifth District Court of New Orleans.

The present case forms no exception, as both the mortgaged property and the domicile of the defendant are within the jurisdiction of the Second Judicial District Court. See C. P. 163. There may be difficulties, and serious ones, in the way of carrying into effect all the details of the act referred to, but while these may well serve as a warning against legislation of this class when it can be avoided, we are not called upon in the present case to pass upon these questions, but only to announce

our opinion that the reservation of jurisdiction over the territory in question in the Second Judicial District Court is constitutional.

It is said that many and grave objections attach to legislation which divides parishes in the formation of judicial districts. This is, doubtless, true, but whether so or not, this was not done by the act in question, which only retained the judicial district as before. It might have been well had the Legislature thought proper to limit the duration of this provision to the expiration of the term of the then presiding judge, and thereafter subjected the territory annexed to the same jurisdiction as other parts of the parish of Orleans. They did not, however, do so, and we can not supply such provision to the act which, had it not reserved jurisdiction, might have been liable to much more serious objection.

The constitution empowers and directs the Legislature to divide the State into judicial districts, which shall remain unchanged for four years. It also provides, that "one judge, learned in the law, shall be elected for each district by the qualified electors thereof;" that "the judges of the district courts shall hold their offices for the term of four years, and that all officers shall continue to discharge the duties of their offices until their successors shall have been inducted into office, except in cases of impeachment or suspension." All civil officers are liable to be impeached or addressed out of office. By article 158 of the ordinance adopted with and to carry the constitution into effect, the terms of all officers chosen at the first election under it were to date from the first Monday of November, 1868, so that at the date of the act No. 71, annexing part of the Second Judicial District to the parish of Orleans, the term of office of the judge of that district had not expired, and had the Legislature not made the reservation of jurisdiction in question, the act might have been liable to serious constitutional difficulties, both on this account and by reason of the subjection of the electors in the annexed district to the jurisdiction of a judge not elected by them, and their being taken from the jurisdiction of the judge who *had been elected by them*.

In the case of the Commonwealth vs. Gamble, 62 Penn. Rep. pp. 352, 353, under a provision of the constitution of that State, in effect and almost in language similar to ours, that "the judges of the common pleas and other courts established by law, *shall* be elected by the electors of the respective districts of such courts," the court says: "It is obvious that this *secures* to the electors of every judicial district the *right* to choose their judges; and it is equally certain that if after an election the Legislature may transfer and make the district part of another district, when the inhabitants have had no participation, or chance of participation, in the election of a judge thus assigned to preside over them, that such an act would utterly ignore the provision of the consti-

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tution which provides for the election of judges by the electors of the respective districts." And again: "If this may be done in this instance, it may be repeated." And so the territory and people might be transferred from time to time indefinitely, without ever exercising the right of participating in the election of a judge at all, "and all such legislation must be utterly void if the constitutional provision for the election of judges be of the slightest consequence."

The constitution of Illinois provided, "that the State shall be divided into nine judicial districts, in each of which one circuit judge shall be elected by the qualified voters thereof, who shall hold his office for the term of six years, and until his successor shall be commissioned and qualified; provided, the General Assembly may increase the number of circuits to meet the future exigencies of the State," and without any such provision as is contained in the constitution of Louisiana, that the districts, when created, "shall remain unchanged for four years," or for any other time. Ballou had been elected judge of one of the circuits of Illinois, and was commissioned and qualified as such on the thirty-first of March, 1857; subsequently an act of the General Assembly, approved on the eleventh of February, 1859, was passed, repealing the act creating the district of which Ballou was judge, and establishing in its stead the twenty-third judicial circuit. Under this latter act another judge, Bangs, was elected and commissioned and proceeded to act, and the court says (23 Ill. p. 550): "The question is, can the Legislature expel a circuit judge from his office by creating a new district and taking from him the territory which constituted his district? The bare reading of the constitution must convince any one that it intended to prohibit such a proceeding. It was the intention of that instrument to place the judges entirely above and beyond legislative control or interference, except by impeachment or address, as provided for in the twelfth section of the fifth article. *It is the constitution which creates the office of circuit judge, and not the Legislature.*" Again, in the same case, the court says: "It is unnecessary now to say whether the Legislature may, under the constitution, reduce the number of judicial districts by abolishing one and attaching its territory to others. *If it may, then, no doubt, the office would cease upon the expiration of the term of the judge of such district, but till the expiration of his term if he conduct himself properly and does not become disqualified, the constitution has not provided, nor has it authorized any mode of expelling him from the office which is created by the constitution, and which he holds under the constitution.*" In other words, such reduction of the number of districts and attaching the territory of one to others, could only take place or go into effect at the close of the term of the judge of the district abolished. *A fortiori*, then, would this seem to be true under the constitution of Louisiana, which not only fixes the

term of office of the judge at four years, but provides that the districts shall remain unchanged for four years. These provisions should be read together and interpreted in harmony.

In 1 Cow. 564, it was held the justices of the peace held their offices for four years, and were not liable to removal before the end of that term, and that though county officers, and limited in jurisdiction to their counties, and in case they are cut off into a new county, which may be done, they are not thereby removed from office, but must be justices of the new county, and that an act of the Legislature providing for the continuance in office of justices residing in towns taken from Ontario and Seneca, now constituting the county of Wayne, is constitutional, and shall stand and be enforced.

In 6 Cow. 646, the same doctrine is reaffirmed, and while the power to create new counties is recognized, it is held to be subordinate to the provision fixing the term of office of justices of the peace at four years, unless removed in the manner provided by the constitution. The court says: "It was the intention of the framers of the constitution to make this important class of judicial officers entirely independent during the period for which they were chosen. And it would be strange, indeed, if the power of removing them from office at pleasure should be found to belong to the Legislature as incident to their acknowledged power of dividing old and erecting new counties (for which read 'districts'), and the power of the Legislature to erect new counties must be exercised in subordination to the imperative provision of the constitution that justices of the peace shall hold their offices for four years, unless removed for misconduct." What can not be done directly can not be done indirectly by the exercise of the power to create new counties. 9 Cow. 640, reaffirms the principles of the two former cases in 1 and 6 Cow.

These decisions are entitled to all the more consideration because coming from New York, a pioneer State in introducing the system of elective judiciary, and from judges whose learning and ability have secured for their decisions respectful attention and authority wherever they are read. Did time serve we might show that the same or similar views have been announced by the courts of other States and by other tribunals of the highest authority. In our own State we are not unaware that in the abnormal, and, we might almost say, revolutionary condition which has prevailed for several years, there has been much loose and improvident legislation affecting these questions which is liable to serious objection, and has been fraught with great inconvenience. While we do not propose to press our inquiries or decision beyond what we deem appropriate to the occasion and the case at bar, we can not avoid expressing the hope that these bad precedents, the outgrowth of disjointed times, may not be followed in future.

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It has often been held here as elsewhere, and is the recognized doctrine of the law in Louisiana, that what can not be done directly can not be done indirectly. In the case of *Downes vs. Towne*, 21 An. 490, the court held that "the Legislature had no power to legislate a judge or constitutional officer out of office, or to diminish or increase the term of office as fixed in the constitution." In the case of the *State ex rel. Robinson vs. Dranguet*, 23 An. 784, the court says that "time and reflection have only strengthened the conviction expressed in *Downes vs. Towne*." The court decided the case of the *State ex rel. Collens vs. Clinton*, Auditor, 26 An. 406, under the special provisions of the constitution for the parish of Orleans, and so expressly stated, and the court was divided. Without being called upon to give our assent to that decision, it is enough to say that it does not therefore and was not intended to vary the rule announced in the two former cases of *Downs* and *Robinson* just quoted. We have been referred to other cases than the one quoted by us, which, however, is the most recent decided by the late court where the effect of act seventy-one of 1874 was considered. Only one of them, the *State vs. Daniel*, can be considered as militating in any degree against the effect of the reservation of jurisdiction in the Second Judicial District. It was peculiar and exceptional, and related entirely to the composition of the juries; but, at all events, so far as in conflict with the views hereinbefore expressed, may be considered as overruled by the later case of *Harrison, Collens, garnishee*, before quoted, and must yield to the weight of authority.

It must be understood that we are not questioning the right and power of the Legislature to create new parishes and to abolish old ones, for though more or less difficulty attends the exercise of such power, it has always existed and been exercised in this as well as the other States of the Union. We are simply showing why it was both constitutional and proper for the Legislature while annexing part of the parish of Jefferson to the parish of Orleans to reserve and retain the jurisdiction of the Second Judicial District Court to which it belonged over the territory so annexed. Had it been the pleasure of the Legislature, we have no doubt they might have made that reservation last only during the term of the then judge of that district, and such seems to have been the practice formerly in legislation of this character. This, however, was not done, and what was done was constitutional, and must be so held and decreed by us.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be annulled, avoided, and reversed; that the exception of the defendant to the jurisdiction of the Fifth District Court of the parish of Orleans be sustained and the suit dismissed, plaintiffs paying costs of both courts.

Since rendering the decree in this case it has come to our knowledge that the court was in error of fact in considering the residence of the defendant and the *situs* of the mortgaged property to be within the territory annexed to the parish of Orleans by act seventy-one of 1874. The court of its own motion ordered a rehearing of this cause that the judgment may conform to the facts while adhering to the principles announced in the opinion accompanying the former decree. Both the residence and mortgaged property of defendant are in the Sixth Municipal District of New Orleans, which was formerly the city of Jefferson, and was annexed to and made part of the parish of Orleans by act No. 7 called session of 1870, instead of act No. 71 of 1874. We have already announced our opinion that it is competent for the Legislature to change the boundaries of parishes (though not of judicial districts) at any time. It therefore resulted from the principles of the opinion heretofore read in this case that the Sixth Municipal District being part of the parish of Orleans had already become subject to the jurisdiction of the district courts of New Orleans prior to act forty-five of 1876, and that the attempt at that time to make it part of the Second Judicial District was in direct violation of the constitution.

The practical and legal difficulties in the way of dividing a parish in the formation of a judicial district forbid our sanctioning such legislation. They have been well remarked upon by the judge *a quo*, and become more apparent in this instance in view of the provisions of the second and third sections of this act which provides for the election by *part* of the voters of the parish of Orleans—those of the Sixth and Seventh Municipal Districts—of a clerk whose election by the qualified electors of the whole parish is provided for by the eighty-third article of the constitution. The anomaly of having the sheriff, who is also a parish officer, act as the executive officer of a court having jurisdiction outside of its limits, and the difficulty in the composition of juries, have been sufficiently illustrated in the case of the State vs. Daniel, Opinion Book 44, p. 649. The exception of the defendant to the jurisdiction of the Fifth District Court of the parish of Orleans was properly overruled.

On the merits, we think the evidence sustains the judgment of the court below, which is therefore affirmed with costs of both courts.

ON REHEARING.

The opinion of the court was delivered by

MARR, J. This suit was brought in the Fifth District Court for the parish of Orleans on the seventh of April, 1876, on a promissory note, and to enforce the mortgage given to secure its payment, and final judg-

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ment was rendered against defendant, which was signed on the twenty-fifth of June, 1876. Defendant lived in the Sixth Municipal District of the city of New Orleans, and the property mortgaged was situated in that district. The only question is as to the jurisdiction of the court.

The Sixth Municipal District was formerly the city of Jefferson, in the parish of Jefferson, part of the Second Judicial District, which was composed of the parishes of Jefferson, St. Bernard, and Plaquemines. By act No. 7 of the extra session of 1870, approved sixteenth of March, the limits of the parish of Orleans were extended to the lower line of the city of Carrollton, and that portion of the parish of Jefferson within the new boundary, including the city of Jefferson, was detached from the parish of Jefferson, annexed to the parish of Orleans, and incorporated in the city of New Orleans as the Sixth Municipal District.

This act is silent as to the jurisdiction to which the territory and the inhabitants thus detached from the parish of Jefferson and annexed to the parish of Orleans should be subject, and if no law otherwise provided the jurisdiction of the courts of the parish of Orleans the First Judicial District would necessarily have extended to all the inhabitants and to all the territory included within and constituting part of the parish of Orleans.

By act No. 71 of 1874, approved twenty-third of March, the city of Carrollton was detached from the parish of Jefferson and annexed to the parish of Orleans as the Seventh Municipal District of the city of New Orleans. The second section of this act provides that the portion of the territory of the parish of Jefferson thus detached and annexed to the parish of Orleans "shall be and remain and constitute part of the Second Judicial District of the State."

In 1876, by act No. 45, approved eighteenth of March, the limits of the Second Judicial District were defined and extended so as to include the Sixth and Seventh Districts of the parish of Orleans, which, with the parishes of Jefferson, St. Bernard, and Plaquemines, were declared to compose the Second Judicial District.

The sessions of the Second Judicial District Court for the Sixth and Seventh Districts were to be held at the court-house in the Seventh District, and this court was declared to have exclusive civil jurisdiction in all cases except matters of probate, when the amount involved exceeds one hundred dollars, and unlimited exclusive jurisdiction in criminal cases. The act goes on to provide for the election of a clerk for this court by the qualified voters of the Sixth and Seventh Districts at the next general election, for the term of four years. The sheriffs of the parish of Orleans were to be the executive officers of the court, the civil sheriff in civil matters and the criminal sheriff in criminal matters.

The jurors were to be drawn by the jury commissioners of the parish

of Orleans from the entire number of registered voters of the Sixth and Seventh Districts. The residents of these districts were declared to be exempt from jury duty in the other courts for the parish of Orleans, and persons residing in other districts were exempt from jury duty in that court.

No one questions the power of the Legislature to change the limits of the parishes, and to detach a portion of one parish and annex it to another parish, but the constitution imposes certain restrictions upon the power of the Legislature to change the judicial districts. The city of Jefferson and the city of Carrollton are no longer parts of the parish of Jefferson, and they are both components of the parish of Orleans. The question is whether they are subject to the jurisdiction of the courts of the First Judicial District, which is composed of the parish of Orleans alone, or to that of the court of the Second Judicial District, as defined by the act of 1876.

The constitutions of 1812, 1852, and 1864 are silent as to the power of the Legislature to change the judicial districts, and it would be to no purpose to inquire what was the practice under these several organic laws. By the constitution of 1845, article seventy-five, the first Legislature assembled under it was required to divide the State into judicial districts, "which shall remain unchanged for six years, and be subject to reorganization every sixth year thereafter." The number of districts to be not less than twelve nor more than twenty, and the term of office of the district judges was fixed at six years. Article seventy-seven.

The constitution of 1868, article eighty-three, provides that "the General Assembly shall divide the State into judicial districts, which shall remain unchanged for four years." The number of districts was to be not less than twelve nor more than twenty, and the district judges were made elective by the people at the general elections for the term of four years.

Although the terms are different, it is obvious that the constitution of 1868 means, as that of 1845 intended, that the Legislature shall not have power to change the judicial districts during the term of office of the judges, and if no other reason justifies this restriction, it is necessary in order to preserve the independence of the judiciary by placing it out of the power of the Legislature to deprive a judge of his office by abolishing his district before the expiration of his term. The authority of the Legislature to establish new districts, as was done in 1870, 1871, and 1874, and to confer upon the Governor the power to appoint the judges, to hold until the next ensuing general election, may well be questioned.

It will be observed that the act of 1874, by which the city of Carrollton ceased to be part of the parish of Jefferson and became part of the parish of Orleans, guarded against any infraction of the constitutional restriction by continuing it under the jurisdiction of the Second Judicial

District, to which it had belonged for years, and this feature of the act may be taken as the expression of the opinion of the Legislature that the territory might be detached from the parish of Jefferson and annexed to the parish of Orleans at any time, but that it could not be immediately detached from the Second Judicial District.

The Second Judicial District, composed of the parishes of Jefferson, St. Bernard, and Plaquemines, was established by the act of 1860, and it existed as then established at the time of the adoption of the constitution of 1868, which recognized and continued in force all laws not inconsistent with it, or not specially excepted. Article 149.

When the city of Jefferson was detached from the parish of Jefferson and annexed to the parish of Orleans, it would have ceased to be a part of the Second Judicial District, because it was no longer a part of the parish of Jefferson, but for the effect of article eighty-three of the constitution, which requires judicial districts to remain unchanged for four years. The act of 1870, No. 7, can not be considered as violative of the constitution in this respect, because it says nothing touching any change of the jurisdiction to which the detached territory had belonged. The act simply extends the limits of the parish of Orleans so as to include the city of Jefferson, and amends the charter of the city of New Orleans. That part of the act which made the city of Jefferson part of the parish of Orleans took effect from and after its passage. If the change of jurisdiction which would otherwise have taken place immediately was prevented by article eighty-three of the constitution, a point which we do not now decide, because it is not properly before us, this effect would only be suspended until the expiration of the four years, that is, until the next ensuing general election, in November, 1872, when the term of the judges of the district courts expired, and we entertain no doubt that from and after that date the city of Jefferson and its inhabitants fell within the jurisdiction of the courts for the parish of Orleans, simply because the territory was a part of the parish of Orleans, and no law otherwise provided, no clause or feature of the constitution, prohibited this legitimate effect and consequence. There is no room for reasonable doubt or question that from and after the general election of November, 1872, up to the passage of the act No. 45 of 1876, suit might have been brought in the Fifth District Court for the parish of Orleans against a resident of the Sixth Municipal District for any cause of action falling within the competency of the court *ratione materiae*.

This act of 1876 must be so interpreted as to have effect and to be consistent with the power of the Legislature, if such interpretation be legally possible. The Legislature seems, by the terms of the act, to have designed to leave the Sixth and Seventh Districts in the condition in which they were at the time of its passage until the next ensuing general elec-

tion in November, 1876. There could be no court without a clerk. This act undertakes to establish a court, but it makes no provision for the appointment of a clerk until the next general election, when a clerk was to be elected by the qualified voters of the two districts for the term of four years, the constitutional term.

By the act of 1874, as we have seen, the city of Carrollton continued to be part of the Second Judicial District; and just there the act of 1876 left it. If the constitution, article eighty-three, prohibited the transfer of this territory to another district before the expiration of the term of office of the judge, these two acts do homage to that article, so far as the Seventh District, the city of Carrollton, is concerned. And if the effect of this act of 1876 was to be suspended until the next ensuing election, the Sixth District would have continued to be part of the First Judicial District, under the jurisdiction of the courts for the parish of Orleans, and the Seventh District would have continued to be a part of the Second Judicial District.

If these views be correct, the city of Jefferson, the Sixth Municipal District, was part of the First Judicial District in November, 1872, and so continued to be until November, 1876. The Fifth District Court for the parish of Orleans had complete jurisdiction of the person and property of defendant, and there is no error in the judgment appealed from.

It is not necessary for us to decide, we desire to be understood as not deciding, whether the courts for the parish of Orleans had jurisdiction over the inhabitants of the Sixth Municipal District prior to November, 1872, nor do we decide, because it is not necessary to decide, in this case, whether the act No. 45 of 1876 is constitutional. It is plainly susceptible of the interpretation which we have given it, that is, that its effect was suspended until November, 1876, as to the Sixth Municipal District; and, as thus interpreted, it is wholly inapplicable to the case before us, without effect upon the rights of the parties to this suit. This interpretation we are bound to adopt *ut res magis valeat quam pereat*.

It is not necessary to express any opinion now as to the force and effect of this act from and after November, 1876, but we may add that the Legislature of 1877, by act No. 85, has repealed it, and transferred the Sixth and Seventh Districts to the jurisdiction of the First Judicial District, to take effect from and after the expiration of the present term of the judge of the Second Judicial District.

We are satisfied that the decree herein rendered on the thirtieth of April, 1877, is correct, and it remains unchanged.

CONCURRING OPINION.

EGAN, J. The parish of Orleans was made by law the First Judicial District of the State. If, then, the limits of the parish of Orleans are *increased* or *diminished*, the territory annexed to the parish is thereby annexed to the First Judicial District, or that taken away and *added* to another parish, which is at the time part of another judicial district, becomes thereby part of that other judicial district. The only limitation is as to the *time* when such act can have such legal effect, owing to the restrictions of the constitution growing out of the term of office of judges, and the term of duration of judicial districts; and as the Legislature can not be supposed to have intended to pass an unconstitutional act, it must be interpreted as we said in the former opinion in this case, and as was said in the Twenty-third Illinois case, in subordination to the provisions of the constitution, articles eighty-three and eighty-four, referred to. On the other hand, where by legislative enactment *territory* is annexed to a parish which *forms either the whole or part* of another judicial district, it must be held that the Legislature intended, by annexation of the territory to the parish, to annex it to the judicial district in which the parish lies to which the territory is added. No other is a reasonable conclusion, and such, we think, is the necessary legal effect of such legislation, and we must hold that the Legislature so intended. We know of no rule of interpretation which requires us to understand or interpret legislation on this subject otherwise than we would in another, *i. e.*, that the Legislature intended by the act of annexation to the parish to change it to the district in which is the parish of which it is made part, and take it away from the district of which the parish from which it is taken made a part. As we before said, however, this is done subject to the limitations named, and while for merely municipal purposes the jurisdiction of the parish to which the territory is added attaches so soon as the act goes into operation, the other effect of changing the judicial district is postponed, as we held in the former opinion, till the close of the term of the judge presiding at the time of the annexation. The Legislature can as well change the limits of a judicial district by passing an act which has that necessary legal effect as by using the precise terms and declaring that such was their intention. This is what was meant in our former opinion in this case.

I concur in the decree and opinion of Mr. Justice Marr in the rehearing of this case.

No. 6668.

CARONDELET CANAL AND NAVIGATION COMPANY VS. NARCISSE PARKER, MASTER
AND OWNER OF SCHOONER VICTORIA No. 2.

The State may incorporate a company to convert an unnavigable, into a navigable stream of water, and, under the express or implied consent of Congress, may authorize the corporation to assess a charge for the use of the stream, on all vessels which shall thereafter navigate it. And such a charge is not a toll, or duty, forbidden by the constitution of the United States, but is a compensation for labors actually performed by the corporation, and availed of by said vessels. The consent of Congress, by which the State is authorized to empower one corporation to assess a toll for performing certain services, will, unless expressly withdrawn by Congress, inure to the benefit of any subsequent corporation chartered by the State to perform and which does perform said services.

A PPEAL from the Fourth Justice of the Peace, parish of Orleans.
Hernandez, J.

C. E. Schmidt and H. D. Ogden, for plaintiffs and appellants.

Louque & Fernandez, for defendant.

The opinion of the court was delivered by

DEBLANC, J. Plaintiff claims from defendant two dollars and twenty-five cents for toll upon the admeasured tonnage of schooner Victoria No. 2, for a pass granted to said schooner out of Bayou St. John.

The defendant denies the right of plaintiffs to recover, for this:

First—That the Bayou St. John is a natural navigable stream emptying into Lake Pontchartrain and connected with the Gulf of Mexico, and is public property, free to the use of all citizens of this and other States of the Union, who have a natural right to navigate said stream with their vessels and to moor the same to the banks thereof.

Second—That by the act of Congress admitting Louisiana as a State into the Union, it was made an express proviso and condition that the river Mississippi and the navigable rivers and waters leading into the same and into the Gulf of Mexico, should be forever common highways free to the inhabitants of all the States and Territories of the United States without tolls or duties therefor imposed by said State. And that by section 5251 of the Revised Statutes of the United States all navigable rivers and waters in the former Territories of Orleans and Louisiana are made forever public highways.

Third—That the charge sought to be collected is a duty on tonnage imposed by the State of Louisiana without the consent of Congress, and is within the prohibition contained in so much of section ten, article one, United States constitution, as provides that "no State shall, without the consent of Congress, lay any duty on tonnage."

From the decree of the lower court rejecting the demand plaintiff has appealed.

29	430
44	397
29	430
118	681

Carondelet Canal and Navigation Company vs. Parker.

In the pleadings and the printed arguments two principal questions are presented:

First—Was Bayou St. John a navigable stream before it was improved by plaintiff and those to whom the plaintiff has succeeded?

Second—If it was navigable, has Congress authorized the collection of toll to pass in and out of it?

Bayou St. John empties into Lake Pontchartrain. In the latter part of the eighteenth and the commencement of the nineteenth century there was a sand-bar at the mouth of the bayou, and, at times, the water was so low on the bar that even a canoe had to be dragged over it. At that date the bayou was not, as it is now, linked by a canal to the city of New Orleans. It thus remained a useless artery between the lake and the city, until the Baron de Carondelet ordered the opening of the canal to which his name was given.

The *projet* of the Spanish Governor was but partly executed under his administration, and when Louisiana became an American Territory it was only with the smallest barks that any one could venture on the few inches of water which had been drawn from the bayou into the inconsiderable canal dug by the baron's order. Except at long intervals and exceptional periods the entrance from the lake into the bayou, from the bayou into the canal, was then impassable for such schooners as that of defendant.

In order to complete the work begun under De Carondelet the Territorial Council, in 1805, granted a charter to the Orleans Navigation Company, empowering that company to improve Bayou St. John, and, under specified conditions, to claim and collect toll from the boats and vessels entering said bayou.

In 1821 the Legislature passed a resolution requiring the Attorney General to issue out of the First District Court a *scire facias*, to ascertain the constitutional validity of said company's charter, and whether, if constitutional, that charter had not been violated by the company.

In obedience to that resolution a suit was filed in the name of the State against the Orleans Navigation Company; the trial of that memorable suit was marked by a display of knowledge and talent which would have enlisted the attention of the ablest jurists of any age or State. The constitutionality of the charter was vindicated and acknowledged. 11 M. 309.

In the report of that case we have found a plain recital of the obstacles which the company had to remove, and from the many pages of that recital we quote at random:

"Until the company had displaced the obstructions at the mouth of Bayou St. John, vessels frequently, when loaded with pitch, tar, and cat-tle, were obliged to throw their cargoes overboard. * * The inhabit-

ants of the other side of the lake were some times a month at home waiting for a rise on the bar. * * These flatboats, drawing from twelve to fourteen inches, were for days aground. * * A number of barges were kept expressly for unloading vessels to enable them to cross the bar. * * The expense for unloading a vessel of twenty tons was thirty dollars, and the cargo was often damaged. * * Those who before the improvement transported goods or produce would willingly have paid double the duties exacted by the company for the advantages derived from those improvements. * * In 1796 there were two or three schooners in the basin of the canal, and it was so filled up that they remained there two or three years before they could get out. * * The navigation had then entirely ceased except in extraordinary high water. * * The toll claimed by plaintiff is less than such vessels had to pay to unload their freight. * * The repairs of the damage done by a crevasse cost the company twenty-three thousand dollars; by a storm twenty-five thousand dollars."

In that case as in this it was urged that the toll authorized by defendant's charter had not been laid with the consent of Congress. To that objection this court answered that in such matters the constitution of the United States does not require an express consent from Congress, and an implied one was to be inferred from the repeated acts of that body adding to the means provided by the Territorial Legislature for the completion of the intended improvements.

That all the navigable rivers in the State are public highways is not disputed. Nor can it be disputed that such highways are free to the citizens of the United States without any impost tax or duty therefor; but in the sense of the congressional statute, when and under what circumstances is a river to be considered as navigable? Is it navigable though closed at its mouth and closed at its source; though full of stumps and logs? Is it navigable when, to cross its ten or twelve sand-bars, the cargo of a vessel has to be thrown overboard; when these bars impede the course of even the hunter's canoe? Is it navigable whenever, at some point, it contains a sufficient quantity of stagnant water to float any bark, though, as a prisoner in a dungeon, that bark can only move from a restricted center to an impassable obstruction, beyond and back of which there are other and as impassable obstructions?

"Une rivière est navigable," said Marcadé, "quand elle peut porter des bâtimens; elle est flottable, dans le sens de notre article, quand elle peut porter des trains ou radeaux; les rivières flottables à bouches perdues ne font partie du domaine public. Une même rivière peut être navigable dans une partie, flottable avec radeaux dans une autre, et non flottable dans la partie supérieure de son cours." Marcadé, vol. 2, pp. 381, 538.

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The congressional enactments we are told stipulate, not merely for the freedom of navigation, but also for an exemption from any impost, tax, or duty. As remarked by Mr. Justice Martin, the organ of the court in the case already alluded to, those words, tax, impost, and duty, "must be confined to the idea which they commonly present to the mind, exactions to fill the public coffers, for the payment of the public debt and the formation of the general welfare of the country, not to a contribution to pay the expenses of building bridges, erecting causeways, or removing obstructions in a water-course, which are to be paid by the individuals who enjoy the advantages resulting from such labor." 11 M. 309.

No State is prohibited by either a clause of the Federal constitution or a congressional statute from improving the navigation of the rivers which flow within its limits; and, as decided by the highest court of the republic, the imposition of a reasonable toll for the use of an improvement of the navigation is not a violation of the ordinance of 1787, which provides:

"The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free as well to the inhabitants of said territory as to the citizens of the United States and those of any other State that may be admitted into the confederacy, without any tax, impost, or duty therefor." 3 McL. 226; 6 McL. 237.

In 1852 this court decided that the Orleans Navigation Company had forfeited its charter, and declared it dissolved and extinct. 7 An. 679.

In 1857, on the sixteenth of March, the corporation prosecuting this suit was created by an act of the Legislature of this State. The powers under which the toll sued for is claimed are conferred by section ten of that act, which reads as follows:

"Be it further enacted, etc., That this corporation may and shall take, possess, hold, and enjoy all and singular the rights, privileges, franchises, immunities, power, and authority which were at any time granted to, received, possessed, enjoyed, and exercised by the late Orleans Navigation Company, under sections nine, ten, eleven, twelve, and thirteen of an act entitled 'an act for improving the internal navigation of the Territory of Orleans,' approved July 3, 1805, as well as those copied at this time by the said New Orleans Canal and Navigation Company, by act approved March 12, 1852," etc.

Defendant contends that, "assuming the first company was authorized by Congress, it does not follow that in 1857 the Legislature had the sanction of that body to create a new corporation and confer upon it the privileges allowed to its predecessor by the original charter." The consent of Congress was given less to the company than to the State

and the enterprise, and to whomsoever and whatever given, that consent never was withdrawn. The State acted under it and granted charters; under it rights were acquired, which neither Congress nor the State could divest. Of that great enterprise the administration alone was confided to the Orleans Navigation Company; that administration and the privileges thereto attached that company has forfeited and lost; but the dissolution of the corporation did not affect, condemn, and destroy the enterprise, and the thrice-expressed congressional sanction protects and guards the charter of 1857.

As on the trial of 1822, the evidence in this case shows, far beyond the reach of any rational doubt, that, for public purposes, as one of the highways of intercourse between States, as a commercial avenue, Bayou St. John was not navigable, and that it was rendered navigable by the efforts and with the funds of plaintiff and its predecessor. Toward the lake it had a natural gate, but it was nearly closed; that gate was opened and kept open by those companies. Toward the city they have widened and kept unobstructed a communication which before was choked with obstructions, and as shallow as insignificant. What they have not actually created they have permanently improved.

Were it not for the works of the plaintiff, for the hundreds of thousands of dollars spent by it and its predecessor, were it not for its daily expenditures, its vigilance, its dredgeboats, its incessant care, were it not for the channel of two thousand feet dug at the cost of those companies from the bank of the lake to the light-house, the smallest barks would have to fold their sails at the mouth of Bayou St. John, and there, as in an antechamber, wait for the irregular rise of the waters of the lake.

Plaintiff has fairly complied with every obligation of its charter. It has enlarged, deepened, straightened, and cleaned the bayou; it has to constantly struggle against the damaging effects of the winds and waves on the embankments and the channel built and dug in the lake. It has aided and increased, to an incalculable extent, the movement of navigation on and through said lake and bayou; it has lessened the expenses and perils of that navigation; it has created an additional harbor, and is now claiming, not an impost, not a tax, not a duty, but a reasonable compensation for a real service, for a service already rendered and which the company continues to render.

The State in granting a charter to plaintiff, and plaintiff in the exercise of its privileges under the charter, have violated no constitution, State or Federal, invaded no highway, interfered with no right, private or public; but, on the contrary, the State by her law, the company by its efforts, have opened to the vessels of every nation another, a safe, an important route, and those who take that route are bound, in law and in

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equity, to pay for the use of improvements which are the result of not less than seventy-two years of an active, costly, and intelligent labor.

To the protection of that invaluable and honest enterprise the faith of the republic and the faith of the State are pledged.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be and it is hereby annulled, avoided, and reversed, and, proceeding to render such judgment as should have been rendered in and by said court—

It is further ordered, adjudged, and decreed that the Carondelet Canal and Navigation Company do have judgment against and recover of Narcisse Parker, master and owner of the schooner Victoria No. 2, the sum of two dollars and twenty-five cents with the costs of appeal and of the lower court.

*This case was decided at Opelousas by consent of litigants.

No. 6615.

JOHN UNTEREINER vs. WILLIAM MILLER ET AL.

When the judgment does not condemn the defendant to pay a certain sum, or do a certain act, the bond for a suspensive appeal must be fixed by the judge, and need only cover costs. An appeal by motion in open court can only be taken pending the term of court, during which the judgment was rendered.

The delay for taking a suspensive appeal can not be extended by agreement of counsel.

This court is absolutely without jurisdiction of any appeal, taken after the legal delay for an appeal has expired.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J.*

Breaux, Fenner & Hall, for plaintiff and appellee.

Hudson & Fearn, for defendant, Haller.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

MARR, J. Unterelner recovered judgment against Miller for nine hundred dollars. Finding no property to satisfy this judgment, he brought suit against Miller and Haller, a revocatory action, to have annulled as fraudulent and simulated a sale made by Miller to Haller of certain real property.

Haller did not answer, and judgment by default was taken against him, and confirmed and signed on the fifteenth of January, 1876, declaring the sale fraudulent and simulated, and of no effect against third persons and

creditors of Miller. Notice of this judgment was served on Haller on the twenty-first of January, and on the first of February the delay for a suspensive appeal from this judgment was extended by agreement of counsel until the expiration of the time for a suspensive appeal from the judgment to be rendered between the plaintiff and the other defendant, Miller.

Citation was served on Miller on the twenty-seventh of November and on Haller on the third of December, and Miller answered on the twentieth of December, 1875. The case was tried as to Miller, and final judgment rendered against him, signed on the thirtieth of January, 1877, declaring the sale to be fraudulent and simulated, and decreeing the property to be subject to seizure and sale to satisfy Untereiner's debt. Both defendants were represented by the same counsel. No appeal was taken from the judgment against Miller, but on the second of February, 1877, Haller moved for and obtained a suspensive appeal from the judgment against him signed on the fifteenth of January, 1876, on his giving bond in the sum of two hundred and fifty dollars, the amount fixed by the court. Untereiner moves to dismiss the appeal, so far as it is suspensive, on the ground that the bond is not sufficient in amount.

The judgment against Haller does not condemn him to do any thing or to pay any thing, and the only bond which could be required of him was one for such sum as might be fixed by the court, sufficient to cover the costs of the appeal. Code of Practice, articles 573 to 577, inclusive.

An appeal can be taken by motion only during the term at which the judgment is rendered. The term at which the judgment was rendered commenced first Monday in November, 1875, and ended third of July, 1876, and the appeal was taken at the succeeding term, which commenced the first Monday in November, 1876, and will end third of July, 1877. The party who desires to appeal, after the expiration of the term at which the judgment was rendered must file a petition praying for an appeal, and cause the appellee to be cited.

"No appeal will lie, except as regards minors, after a year has expired, to be computed from the day on which the final judgment was rendered, if the party claiming the same reside in the State, and after two years, if he be absent therefrom." C. P. article 593.

This law is imperative, and it can not be abrogated by the agreement of counsel to extend the delay for the taking of a suspensive appeal. No consent of parties can give this court jurisdiction or enlarge its powers. If, in any given case, "no appeal will lie," whether because of the amount in dispute, or because the time limited for an appeal has expired, the appellate court has no jurisdiction, and every court is bound, *ex officio*, to take notice of the want of jurisdiction patent on the face of the record,

Unterselner vs. Miller.

although the parties may be willing and may consent not to raise the question.

The bond being for the amount fixed by the judge is sufficient. Possibly the informality of an appeal by motion at the term succeeding that at which the judgment was rendered would be cured by the voluntary appearance of the appellee for any other purpose than to move for the dismissal on that ground, but as the right of appeal had ceased, become extinct, by the expiration of one year, this court is without jurisdiction, and must so decide without motion to that effect.

It is therefore ordered, adjudged, and decreed that the appeal herein taken be dismissed at the costs of appellant.

No. 5696.

SUCCESSION OF M. M. DOWLER.

The creditor of a succession can not demand that the auctioneer, who has sold property of the succession, shall pay over the proceeds of the property. Only the one charged with the administration of the succession, is empowered to make such demand.

The auctioneer is entitled to reserve out of the proceeds of property sold by him, the amount of his commissions, and the expenses of the sale.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J.*

McGloin & Nixon, for W. I. Hodgson, appellant.

Braughn, Buck & Dinkelspiel, for appellee.

James Lingan, for the succession.

The opinion of the court was delivered by

MARR, J. Certain property of the succession of M. M. Dowler had been sold in the course of administration by Hodgson, auctioneer, by order of the Second District Court.

On the ninth of November, 1874, Mauske, a judgment creditor, took a rule on Mrs. Ann Dowler, tutrix, on which judgment was rendered on the twenty-first of December ordering the sale to be completed and the cash portion of the price to be deposited by the tutrix in the hands of the sheriff, subject to the further orders of the court.

On the fourth of January, the sheriff addressed a note to Hodgson saying that he had been requested by the attorneys of the purchaser to call on him, Hodgson, for the sum of seven hundred and twenty dollars held by him in the succession of Dowler, and ordered by the Second District Court to be deposited with the civil sheriff.

On the eighteenth of January the attorneys of Mauske, suggesting that

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Hodgson had been served with an order requiring him to pay into the hands of the sheriff the proceeds of the sale, took a rule on him to show cause why he should not pay over the money at once, or be punished for contempt.

Hodgson excepted that Mauske had no right to stand in judgment in this matter, and that the only person who could take such proceedings against him was the administratrix. Reserving the benefit of the exception, he stated that he had received the seven hundred and twenty dollars as cash payment on the property sold; that he had advertised and offered the property four times, under as many different orders of the court; that the sale was completed, and the title passed and accepted on the twenty-ninth of December, 1874; that he had incurred expenses and charges amounting to \$342 80, leaving balance in his hands \$347 20, after deducting his commissions, thirty dollars, and thirty dollars paid the notary for canceling mortgages, etc., by consent of all parties.

He denied that he had ever been served with any order of the court requiring him to pay over any funds, as set forth in the rule. He claimed the right to retain the amount of his commissions, expenses, and charges, and stated that he had ever been ready and willing to pay over the balance in his hands under order of the court, and that on the nineteenth of January he had tendered the amount to the sheriff, who had refused to receive it, under instructions from the attorney of the succession.

The rule was made absolute, and Hodgson was ordered, within five days, to deposit the proceeds of the sale in the hands of the civil sheriff, and from this judgment he appealed.

On the trial Hodgson testified that the total amount received in cash was seven hundred and fifty dollars; that he had never been informed that an order had been issued requiring him to make a deposit of the money with the sheriff until since the rule had been served on him, and that he had made a tender of the balance in his hands to the sheriff, after receiving a note from him to that effect.

A bill of exceptions informs us that Hodgson offered to prove the amount of expenses incurred in selling the property, which testimony was objected to by counsel for plaintiff in rule and refused by the court, on the ground that he could not prove any offset against the succession of Dowler when called upon to account for money in hand belonging to the succession, and that such evidence, if admitted, would be no defense to his rule.

We think the court erred in maintaining this rule. Mauske had no right to control the funds in the hands of the auctioneer. It was the business of the tutrix, or the person administering the succession, to demand the money of Hodgson, and we are at a loss to know what the

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sheriff had to do with this business; why the money of the succession, to which the tutrix was legally entitled, and for which she is legally accountable, should have been ordered into the custody of the sheriff.

If the rule could have been maintained, the court should have received the testimony offered to prove the amount of Hodgson's claim. It was not in the nature of an offset; it was not a debt due by the deceased; it was simply the unquestionable right of the auctioneer to retain out of the gross proceeds in his hands the expenses incurred and his charges and commissions for selling the property. The law fixes the commissions, but the other charges are dependent on the proof, and no law makes it the duty of the auctioneer to pay the entire proceeds into the hands of the person legally entitled to it, much less into the hands of the sheriff, a stranger to the proceeding, and to claim his expenses and charges as a creditor. If the court had heard the testimony, and had fixed the amount justly chargeable against the proceeds, and had ordered Hodgson to pay the balance to the tutrix, this litigation would probably have ended there, and we would be glad, if it were in our power, to make this disposition of the case.

The rule taken by Mauske was officious. The sale was completed only on the twenty-ninth of December. *Non constat* that the tutrix and the auctioneer would not have settled this matter amicably and properly, and that the net proceeds of sale would not have been paid over to the tutrix by the auctioneer without unreasonable delay. Mauske had a right to call on the tutrix to account and to pay the debt due him, but he had no right to interfere with the administration by provoking an order to have the money, which should have gone into the hands of the tutrix, placed in the hands of the sheriff. It is the business of the person charged with the administration to demand debts, money, and property belonging to the succession, and to administer and dispose of the effects under the order of the probate court, but the creditors of the succession have nothing to do with the property, nor with the debts, nor the debtors of the succession.

In the hope of promoting a correct and speedy settlement, which ought to be a very simple matter, we suggest that the proper course is for the tutrix, or the person administering the succession, to take a rule on Hodgson to show cause why he should not pay the money in his hands, proceeds of sale of the property of the succession. In answer to this rule he would set out in detail whatever deductions he claims for costs, charges, and commissions. The court would hear the proof, fix the amount, and order Hodgson to pay over the balance.

As the case comes before us, we are compelled to reverse the judgment appealed from, and we do this with less reluctance because the costs will

fall upon the person whose unwarranted interference has caused this delay in the settlement of the succession.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and annulled; that the rule herein taken by Otto Mauske, on the eighteenth of January, 1875, upon which the judgment appealed from was rendered, be dismissed, and that Otto Mauske pay the costs in the court below and of this appeal.

No. 6240.

JOHN V. SEVIER VS. INEZ R. GORDON, WIFE, ETC.

29 440
152 354

Heirs who, when they attain majority, sue for a partition of the property of the succession, and enter into its possession, thereby accept the succession purely and simply. They cease to be beneficiary heirs, and become personally bound for the debts of the succession.

Creditors of a succession who permit the heirs to take possession of its property without having resorted to the action for a separation of patrimony, become mere ordinary creditors of the heirs.

One who buys the interest of an heir in a succession, the administration of which has closed, and the property of which is in the possession of the heirs, does not become liable for that heir's share of the debts of the succession.

A PPEAL from the Thirteenth Judicial District Court, parish of Tensas. *Hough, J.*

Farrar & Reeves and E. H. Farrar, for plaintiff and appellant.

Drake & Garrett, for defendant.

The opinion of the court was delivered by

MARR, J. James G. Gordon died in 1855, leaving five children, all minors. His succession was administered in Tensas, the parish of his domicile, first by the executor named in the will, who died in 1867, and subsequently by a dative executor, who was discharged in 1871.

In December, 1868, two of the heirs brought suit against the others for a partition; and final partition was made in January, 1870, and homologated on the third of May, 1870. The entire property of the succession consisted of the Verona plantation; and it was divided in kind, and the portions allotted to the heirs, respectively, were designated by proper description and conveyed to them.

Mrs. Inez Ruth Gordon, wife of John Gordon, one of the five heirs, brought suit for a separation of property, and recovered judgment against her husband in October, 1869, for fourteen thousand dollars, with recognition of her mortgage on all his property, dating, as to part of her demand, in January, 1861, and as to the remainder in January, 1862. Execution issued on this judgment, under which the sheriff seized the

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interest of John Gordon in the estate of his father, and it was adjudicated to Mrs. Gordon in May, 1870, after the homologation of the partition.

In June, 1867, John V. Sevier brought suit against the executor of James G. Gordon, and recovered judgment, which was affirmed by this court in 1870. He attempted to enforce this judgment in the district court, in which it was rendered, and obtained an order in April, 1870, requiring the executor to sell the property of the succession for that purpose. This court decided that this proceeding in the district court was void for want of jurisdiction. 23 An. 212.

The executor filed his final account, which was homologated in May, 1871; and he was discharged, and his bond canceled. Sevier appealed from this judgment; and his appeal was dismissed in March, 1872. He then brought suit and obtained judgment, declaring the partition an absolute nullity, annulling the judgment by which the executor was discharged, and ordering him to resume the possession and administration of the property; and shortly after he obtained an order from the parish court requiring the executor to sell the Verona plantation in satisfaction of his judgment.

This court decided in the suit for nullity that the executor had been properly discharged, and that the heirs were legally entitled to the possession which they held under the partition. 25 An. 220. In the other case, the court reversed the judgment of the parish court, and decided that the succession of Gordon was closed, and that the proceeding against the person who had been executor, requiring him to sell the property, was unauthorized by law. 25 An. 231. This was but the affirmation of the decision, rendered the year before, in the suit of Fowler vs. the Succession of Gordon. 24 An. 270.

Sevier then brought this suit against Mrs. Gordon, who was a widow at that time, to recover the virile share, one fifth of the judgment, for which her deceased husband was liable as one of the heirs of James G. Gordon. He bases his action on two grounds —

First—That by purchasing, under her judgment, the individual interest of her husband in the succession, she assumed his portion of the debts of the succession.

Second—That in the answer filed by her to the rule to compel the discharged executor to sell the Verona plantation, Mrs. Gordon had, judicially and in writing, assumed to pay the virile portion of her husband.

The defendant denied the alleged liability. She plead that the matter in controversy had become *res adjudicata* by the several decisions of this court already referred to; and she specially denied "that she ever, directly or indirectly, judicially or otherwise, assumed, covenanted, or promised to pay the pretended debt asserted by plaintiff, and avers that

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if any such promise, covenant, or assumpsit was ever made or filed in any proceeding by her attorney, the same was done without her consent, authority, or sanction, and against her will, and was made and done in error."

The judgment of the court below was in favor of defendant, and plaintiff appealed. His counsel have filed an elaborate brief, the purpose of which is to show that, as John Gordon was a minor when his father died, he was necessarily a beneficiary heir; that the separation of patrimony was the legal consequence; and that the creditors of the succession are entitled to be paid by preference out of the property inherited.

It is true that minors are beneficiary heirs; that beneficiary heirs are entitled to the residuum only after the debts of the succession are paid; and that they are not personally liable for the debts of the succession. It is equally true that the beneficiary heirs, when they obtain their majority, may become heirs purely and simply, and may obtain possession as owners of the property of the succession, and be liable for its debts. In this case the heirs provoked a partition, and went into possession. The succession thereupon ceased to exist; and those who were originally beneficiary heirs, because of their minority, became absolute heirs, and liable, each for his virile share, personally and unconditionally, for the debts of the succession which had not been paid.

The liability of the heirs for the debts of the succession results from their unqualified acceptance. Where the acceptance is with benefit of inventory the succession must be administered, and the debts paid in course of administration, and the beneficiary heir is not liable for his virile share, nor for any other share or portion of the debts. Where the acceptance is pure and simple the heirs are entitled to be put into possession, subject to the right of the creditors to demand an administration; and they become at once personally liable for the debts of the succession. R. C. C. 1032 to 1070, inclusive. The separation of patrimony is the means, provided by law, of preventing the individual creditors of the persons who are heirs from subjecting to their debts, to the prejudice of the creditors of the succession, the property inherited, or, *vice versa*, of preventing the creditors of the heirs, as such, from subjecting the property of the heirs, not derived from the succession, to their debts, to the prejudice of the individual creditors of the persons who are heirs. No such measures are required with respect to the beneficiary heir, and the separation of patrimony is not applicable to him, because he can not obtain possession of any of the property or effects of the succession until the debts are paid, and the administration closed; and his individual creditors could by no means reach the property of the succession under administration. R. C. C. arts. 1444 to 1464, inclusive.

The heirs have the right, at any time, to demand of the executor the possession of the succession by offering him a sum sufficient to pay the movable legacies. R. C. C. 1671. If there are claims pending in court for the money or property of the succession, the heirs may be compelled by the creditors, before obtaining actual possession, to give security for the money so claimed, or property, in suit. R. C. C. art. 1012.

The demand, by suit, of a judicial partition, was an acceptance by the heirs pure and simple, because, as beneficiary heirs, they could not have arrested the administration, nor claimed any part of the succession until the debts were paid and a residuum remained for distribution. It is the right of the creditors to demand the separation of patrimony; but this must be done within three months after the tacit or express acceptance by the heirs, (R. C. C. 1444 to 1456); and they must declare, under oath, that they believe the heir is embarrassed with debts, which they have reason to believe will absorb the effects of the succession. R. C. C. 1457.

If there could be any doubt as to the effect of the demand of a judicial partition, the actual partition, and the taking possession by the heirs of their respective shares, constituted a plain and unequivocal acceptance; and the separation of patrimony was never demanded, nor was any security required of the heirs. The consequence is that the creditors of the succession have become thereby the creditors of the heirs, each for his virile share; and they have precisely the same rights as any other ordinary creditors of the persons who are the heirs.

These principles are elementary; and it was necessary to enunciate them only to prepare the way for the consideration of the two grounds upon which the plaintiff relies.

First—By the partition made on the twenty-fourth of January, 1870, the specific part of the Verona plantation which fell to John Gordon became absolutely his property, and the legal title vested in him. It was thenceforth liable to seizure by his creditors, without distinction; and it was seized on the second of April, 1870, and sold on the sixteenth of May, 1870, at the instance of his wife, his judgment creditor, who had also a mortgage, judicially recognized.

It is true the sheriff seized and sold "the undivided interest of John Gordon in the estate of James G. Gordon, deceased, said succession property being composed of the Verona plantation, said interest consisting of one fifth of said entire succession," but this in no manner changed the relations of Mrs. Gordon to the property or to the creditors. Plaintiff had no mortgage, no lien, no privilege, no right of preference on this property, and no judgment against John Gordon, and the seizure and sale by the judgment creditor of John Gordon divested his interest, whatever it might be, whenever and however ascertained, and vested it

in Mrs. Gordon, the purchaser, to the exclusion of all other persons whomsoever.

Every personal creditor of John Gordon had the same right precisely as plaintiff had, the right to sue, obtain judgment, and seize and sell John Gordon's property. By her purchase Mrs. Gordon incurred no liability to plaintiff. She simply enforced her rights against her debtor, to the extent of the value of his property, and in no sense did she take his place as debtor of plaintiff, or as debtor of any other person.

Second—The answer of Mrs. Gordon, alleged to be a judicial confession of liability, was filed on the twenty-seventh of September, 1872, and is in these words:

"If the judgment set forth in said rule be final, respondent, under the law, elects to pay whatever portion of the debt may be due by her on said judgment, in order to save her portion of the Verona plantation from being sold."

Too much importance has been attached to this answer. It contains no word of promise, and it is simply the declaration of Mrs. Gordon's election to pay whatever might be due by her rather than have her property sold. The only motive was to save her property, in the event that it was liable, by paying the debt for which she supposed it might be sold. But the property, clearly, was not liable. While it belonged to the succession it was liable for the debts of the succession. When it went into the possession of the heirs, in virtue of the partition, it became their property, and was liable for all their debts, respectively. It could no longer be pursued by the creditors of the succession as the property of the succession, because the succession had ceased to exist. If Mrs. Gordon had known that the property was not legally bound, there would have been no occasion, no motive for any such election, and if she had unconditionally promised to pay the debt, believing that her property was bound for it, there would have been such error in the motive as would have made the promise void.

If this answer could be interpreted to be, what it certainly is not by its terms, an assumption of the portion of the judgment for which John Gordon was liable, it would be without effect, for two reasons:

First—Because there could have existed no other consideration for this assumption than the erroneous belief that the property was bound and would be sold in satisfaction of the judgment.

Second—Because Mrs. Gordon was a stranger, a third person, not a party to the contract or the judgment; and by the act of 1858, Revised Statutes, section 1443, the promise to pay the debt of another must be in writing, "signed by the party to be charged, or by his specially authorized agent or attorney in fact." The attorney at law employed to defend his client is not such a "specially authorized agent or attor-

Sevier vs. Inez R. Gordon.

ney in fact," and there would be no occasion for his professional services if the debt sued for was to be assumed and paid by his client.

We do not think that the attorney of Mrs. Gordon intended to bind her to pay the debt; and we are satisfied he had no such power. The election to pay in money, in the event of liability, rather than have property sold, is not an assumption and promise to pay absolutely. It is contingent upon liability, and that liability did not exist. Mrs. Gordon was not the heir of her husband. She was his creditor for a sum exceeding the value of his entire inheritance, and she was under no obligation, legal or moral, to pay his debts.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed with costs.

Spencer, J., recused.

CONCURRING OPINION.

EGAN, J. Where heirs accept with benefit of inventory administration is proper, and the law directs the judge so to order. I am not prepared, however, to subscribe to the doctrine that if there be no administration the heirs can not be sued directly and that they are not bound to any extent. I think they may be so sued and held liable to the extent of the value of the property inherited. They may, however, be discharged from all personal liability by surrendering to the creditors the property of the succession. It is only during the term for deliberating that the heir can not be sued. I concur, however, in the decree in this case and in the opinion generally.

ON REHEARING.

The opinion of the court was delivered by

EGAN, J. It is argued that acceptance of a succession with benefit of inventory has the same effect as the action of separation of patrimony. We do not think so. The action for separation of patrimony of the ancestor from that of the heir allowed to the creditor from its very nature has no application except in case of the unconditional acceptance by the heir, and to avoid the consequences of the property derived from the succession being so mixed with that acquired otherwise that it may become liable to incumbrances or debts of the heir to the detriment or exclusion of the creditor of the ancestor. This action is only allowed within a limited time. The original acceptance with benefit of inventory did not prevent the subsequent unconditional acceptance in the present case, and the creditor did not resort to the action of separation.

The rehearing is refused.

Hunt & Macaulay vs. Mississippi Central Railroad Company.

No. 5355.

HUNT & MACAULAY VS. MISSISSIPPI CENTRAL RAILROAD COMPANY.

A railroad corporation will not be held liable for the value of property erroneously receipted for by one of its station agents, and which was never received by the road, when the party claiming the value of the property, who is the factor and agent of the alleged consignor, fails to show that he has made any specific loan on said property, on the faith of the agent's erroneous receipt.

The case would not be different, even if the plaintiff were a stranger, who had advanced money purely on the faith of the receipt.

The clause in a bill of lading, which acknowledges the receipt of property, or declares as to its condition, may be disproved by parol proof.

The holder of a bill of lading can acquire no greater rights under it than were possessed by the original consignee.

A common carrier is no more bound by a bill of lading given by his agent, for goods not received by him, than by a bill of exchange signed with his name by one not authorized to sign it.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J.*

Thomas Hunton, for plaintiff and appellee.

L. E. Simonds, for defendants.

The opinion of the court was delivered by

MARR, J. Plaintiffs seek to recover of defendant the value of fourteen bales of cotton, alleged to have been shipped by J. W. Mitchell & Co., at Goodman, Mississippi, consigned to plaintiffs, and not delivered.

The defendant answers that four of the bales have been delivered or accounted for; and as to the remaining ten bales that there were two receipts or railroad bills of lading given by the station agent at Goodman, one dated the eighteenth of December, 1869, for ten bales, the other dated the first of January, 1870, for thirty-three bales; that by mistake of the agent the ten bales for which the receipt of the eighteenth of December was given were included in the receipt of the first of January; that thirty-three bales only were delivered; and that defendant is not liable for the cotton which was not delivered to the agent.

There was judgment in favor of plaintiff for the value of twelve bales, and defendant has taken this appeal.

We think that the proof accounts satisfactorily for four of the bales, and we understand from the brief of counsel for plaintiffs that the controversy is limited to ten bales.

A comparison of the two receipts shows the identity of the marks and numbers of the ten bales for which the receipt of the eighteenth of December was given and ten of the thirty-three bales included in the receipt of the first of January; and the testimony of Kendel, the station agent at Goodman, explains this fully, and shows how the mistake occurred.

About the eighteenth of December the road was blocked with cotton

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and Kendel ceased to give receipts until about the first of January. On that day the shipping clerk of J. W. Mitchell & Co. went with his check-book to the station-agent to get a receipt, and the whole number of bales which had been delivered by Mitchell & Co. was found to be thirty-three. The receipt of eighteenth of December was given by Kennedy, the assistant of Kendel, and Kendel, not knowing that it had been given, gave the receipt of the first of January for the whole number, thirty-three, including the ten bales for which the receipt of the eighteenth of December had already been given.

Afterward the agent, having discovered the mistake, went to Mitchell & Co., and they stated to him that they had but one lot of the same marks; that is was probable duplicate receipts had been given; but that they claimed only what their book showed.

One of the plaintiffs, interrogated on facts and articles, stated that Mitchell & Co., after this suit was brought, asked plaintiffs "to stop the proceedings for fear of duplicate receipts." Before that they had told plaintiffs that all the cotton claimed had been put on the platform at the railroad depot, and that the railroad owed for it.

We have no doubt that the ten bales mentioned and described in the receipt of the eighteenth of December were identical with ten of the bales included in the receipt of the first of January; that this mistake occurred just as stated by Kendel; and that he neither perpetrated nor intended any fraud.

The two receipts differ only in date, number of bales, etc., and, omitting these particulars, they read as follows:

"Received of J. W. Mitchell & Co., — bales, etc., to be transported from Goodman, on the Mississippi Central Railroad, to New Orleans, and consigned to Hunt & Macaulay. But this company receives said cotton for transportation conditioned that it shall be liable only for loss resulting from negligence."

It will be seen that this instrument differs from the more formal bill of lading in general use in transportation by water. It contains no words of negotiability; it makes no stipulation for the payment of freight, and it does not bind the carrier in express terms to deliver to the consignee.

Plaintiffs base their right to recover on the ground that they made advances to Mitchell & Co. on the faith of these receipts which they would not otherwise have made. The defense is that the corporation is not bound by the receipt or bill of lading given by the station-agent in error, and that it is not liable for the cotton not actually delivered to the agent for transportation.

The answer of plaintiffs to the second interrogatory propounded to them explains the relations between them and Mitchell & Co. in few words:

"J. W. Mitchell & Co. owed plaintiffs a large balance in the fall of 1869. We made an arrangement with them by which they were to continue their shipments to us and we were to advance a portion of this value, the object being to give them an opportunity to pay off their debts."

On the seventeenth of December, 1869, Mitchell & Co. owed plaintiffs a balance of \$12,912 15, against which plaintiffs held, for sale at that date, fourteen bales of cotton. From the seventeenth of December to the fifteenth of March inclusive plaintiffs made other advances amounting to \$13,013. The total credits during that period aggregated \$18,163 94, which extinguished the debt subsequent to the seventeenth of December and left \$6150 94 to be applied to the \$12,912 15, balance due on the seventeenth of December, thus reducing that balance and the entire indebtedness of Mitchell & Co. to \$6761 21, which was closed on the first of April, 1870, by the notes of Mitchell & Co.

An inspection of the account rendered by plaintiffs will show that the advances were not made specifically, but were carried into general account, just as were the proceeds of sales. For example: the account beginning the seventeenth of December was increased up to the first of January to \$17,035 03; reduced by sales credited the twenty-second and thirtieth of December to \$14,763 66, and this was at the time the road was blocked with cotton, and shipments from Goodman must have been very uncertain. And again, from the nineteenth of January to the fifteenth of March inclusive, when there was no longer reason to expect the delivery of the ten bales short on the receipts of the eighteenth of December and the first of January, plaintiffs made advances to Mitchell & Co. aggregating something over five thousand dollars. It is not probable that a business of so much interest and importance to the plaintiffs would have been seriously affected or the amount of advances to Mitchell & Co. materially increased or diminished by the shipment of ten bales more or ten bales less at so early a period in the shipping season, when plaintiffs were just beginning to realize the benefits which they hoped for from the advances to Mitchell & Co.

In the usual course of business, after the carrier has received the goods, he gives a bill of lading to the shipper, and the shipper transmits it with a letter of advice to the consignee. The consignee can not, ordinarily, in the very nature of things, verify the signature of the shipmaster, or clerk of a boat, or railroad station-agent, by whom, at some remote place, it may be in a foreign land, the bill of lading purports to have been signed. But he is legally bound to know the signature of his regular correspondents, and when he receives the bill of lading he honors the bill of exchange drawn against the shipment or makes the required advance, not upon any proof which the bill of lading affords him of its

genuineness or of the authority of the person by whom it purports to have been signed, of which in most cases he must be ignorant, but upon the confidence which he reposes in the good faith of his correspondent, the shipper, who forwards to him the bill of lading and letter of advice and who must have perfect information as to its genuineness and the authority of the person by whom it is signed.

The contracts of affreightment of which the two receipts in question are the evidence were made with Mitchell & Co. at the locality at which the shipments were made. These receipts were transmitted by Mitchell & Co. to the plaintiffs. Plaintiffs did not rely on the railroad-agent; they relied on their regular correspondents, Mitchell & Co., who, by the mere fact of transmitting the receipts to plaintiffs, warranted them to be genuine and correct in every particular.

Plaintiffs were the factors, the agents of Mitchell & Co., and this relation between them was not a new one. The cotton belonged to Mitchell & Co., and when it went into the hands of plaintiffs they were entitled to retain the proceeds on account of their advances. If the cotton had been damaged or lost *in transitu* or at any time before the sale and delivery by the plaintiffs, the loss would have fallen on Mitchell & Co., and not on the plaintiffs. The case, therefore, with which we are dealing is not that of a stranger making a shipment and obtaining advances or selling the goods to arrive on the mere showing of the bill of lading. It is the case of a principal who, for two seasons at least, has been shipping his property for sale for his account to his regular consignee and agent, in the course of a regular and continuous business, and who, in the course of that business, sends the evidence of a single shipment larger than that actually made at that time, and who, it may be, obtains a larger advance thereby than would otherwise have been made at that time. This consignee, holding the bill of lading, might indeed sue the carrier, in his own name, for short delivery, but the suit would be in reality for the benefit of the shipper, the owner, and the consignee could only exercise, as agent, the rights of his principal, and recover upon the contract to the same extent as the principal might have done in a suit in his own name.

So far as this branch of the case is concerned the question is, not whether a stranger, the innocent holder for value of a bill of lading, may recover of the carrier for short delivery, but whether the owners of the property, the shippers, Mitchell & Co., who had full knowledge of the mistake in the bill of lading, who could not have been ignorant of the quantity or of the marks of their own cotton, are to be allowed to take advantage of this mistake on the part of the station-agent, by which they were not deceived, and which occasioned to them no loss or diminution of property. Can the carrier be compelled to pay so much

of the debt of Mitchell & Co. to the plaintiffs as would have been paid if Mitchell & Co. had actually shipped the ten bales of cotton, which they did not ship and which they did not have to ship?

It must not be forgotten that Mitchell & Co. began the business of 1869-70 with a large balance against them; that that balance was nearly doubled by subsequent advances; that the proceeds of the shipments made by them during that season exceeded by \$6150 94 the advances made that season and reduced by that amount the balance against them with which that season's business commenced; that by subsequent settlements their indebtedness to plaintiffs had been reduced to about two thousand dollars; and, if plaintiffs succeed in the present suit, Mitchell & Co. will have the benefit of the amount recovered by the reduction, *pro tanto*, of their debt to the plaintiffs.

The carrier took care to limit his liability to loss resulting from negligence. It is evident that this negligence must be predicated of some act or omission subsequent to the delivery of the goods to the carrier, and the contract can not be made to relate back to any period anterior to this delivery. It is not pretended that there was any act or omission constituting negligence subsequent to the delivery of the cotton to the carrier. He simply did not transport and deliver to the consignee that which had not been delivered to him for that purpose, and no law makes him liable for such failure.

It is elementary in the law of carriers that the goods to be transported must be received by the carrier before his liability commences. This is expressed in the Roman law, Dig. Lib. iv., tit. 9, thus: "IT PRÆTOR: *Nautæ, etc., quod cujusque saluum fore RECEPERINT, nisi restituant in eos judicium dabo.*" It is evident from the terms of our Code, articles 2751 (2722) *et seq.*, that delivery to the carrier is a prerequisite to liability; and this is forcibly and neatly expressed in the maxim: "*La marchandise est obligée au botel, et le botel est obligé à la marchandise.*"

It is unquestionably true, as a general proposition, that the master or clerk of a vessel can not bind the owner by a bill of lading for goods which have not been delivered for transportation, and no greater power or authority in this respect can be claimed for a railroad station-agent.

The receipt in this case is for thirty-three bales of cotton; the proof is conclusive that there were but twenty-three bales. Can the consignee, the agent of the owners, the shippers, hold the carrier for the ten bales?

It is well settled that so much of a bill of lading as is a receipt may be explained, while that part of it which is a contract can not be explained by parol testimony. That part of the instrument which acknowledges the receipt of the goods may be explained, and it may be shown that the goods, in fact, were not delivered to the carrier; but, if the goods have been actually received, the contract to transport them to

the place of destination and there to deliver them in the like order in which they were received to the consignee, or to his assigns, or to order, according to the terms, can not be modified or explained by parol.

Bills of lading have been for a long time considered as negotiable instruments, and they are in very general use as the means of obtaining advances on goods on shipboard to arrive. These bills of lading contain words of negotiability, obligating the carrier to deliver to the consignee, or to his assigns, or to the order of the shipper, and the opinion has prevailed to a considerable extent that the person who advances his money on the faith of a bill of lading in which he is named as consignee or which comes to him by regular transfer from the consignee or the shipper to his own order is to be protected in the same manner as the innocent holder for value, before maturity, of a bill of exchange.

There was always this difficulty inherent in the bill of lading, where there was no question as to the authority of the person by whom it was signed. The bill of lading is in part a receipt and in part a contract, and, while it might not be admissible to explain or vary a contract in writing by parol testimony, it is elementary that a receipt is always open to explanation.

The true principle would seem to be that the bill of lading is negotiable in this restricted sense, that it is transferable by assignment or indorsement, and that the transferee takes it with all the rights against the carrier that it conferred upon the original consignee, or the person to whose assigns or to whose order the goods are to be delivered, while the innocent indorsee for value, before maturity, of a bill of exchange has nothing to do with the rights of the original parties as between themselves.

The failure to observe this plain and obvious distinction has caused the elementary principle, that a receipt may always be explained, to be lost sight of, and cases are to be found in which it was decided that, as against the innocent holder for value of a bill of lading, the carrier could not show that the quantity of goods acknowledged by the bill of lading to have been received was not actually delivered to him, nor that the real condition, though not indicated by any external manifestation, was different from the apparent good order recited in the bill of lading.

To this class of cases may be referred *Bradstreet vs. Herne*, Abbott's Admiralty Reports, 209, decided in 1848, and *Dickerson vs. Seelye*, 12 Barbour, 99, decided in 1851. The case of the *Mary Ann Guest*, Olcott, 500, simply decides that the carrier can not exonerate himself from liability to the holder of the bill of lading on the ground that after arriving at the port of destination, the goods were taken out of his possession by the sheriff at the suit of the vendor claiming the right of stoppage *in transitu*.

In *Wolter vs. Brewer*, 11 Mass., 100, decided in 1814, the master of the ship had signed, at Montevideo, a bill of lading for ten packages of skins, and the bill of lading was properly indorsed to an innocent third person for value. On the arrival of the vessel at Boston the master delivered five of the ten packages, and the suit was against the owner of the ship for the five packages not delivered. The fraud of the master in signing the bill of lading was manifest, and the court held that he had no power to bind the owner by signing bills of lading for goods not actually shipped.

There seems to have been some doubt about the law on this subject in England before the case of *Grant vs. Norway*, decided in 1851. The case was this: A ship was lying in the Hoogly, bound for London, and the master signed a bill of lading for twelve cases of silks, consigned to order. A bill of exchange on London was drawn against this shipment, and the bill of lading was indorsed to and deposited as security with the innocent indorsee of the bill of exchange, who gave value for it. The silks were not delivered to the master, and the ship sailed without them. Acceptance of the bill of exchange was refused by the drawee, and the innocent holder brought suit against the owners of the ship to recover the amount advanced by him on the faith of the bill of lading. The owners raised the direct question as to the authority of the master to bind them by a bill of lading for goods not delivered to him. The verdict of the jury was special, finding the facts substantially as stated, and the law point was reserved for argument. A stronger case in favor of the holder of the bill of lading could not well be imagined. The discussion was most elaborate, and the court fully appreciated the importance of the issues involved. The Chief Justice delivering the opinion of the court in favor of the defendants, puts the question thus: "Whether the master of a ship signing a bill of lading for goods which have never been shipped is to be considered as the agent of the owner in that behalf, so as to make the latter responsible?"

After stating the great authority necessarily vested in the master of a ship, extending even to the signing of a bill of sale, in case of disaster, the court said:

"So, with regard to goods put on board, he may sign a bill of lading and acknowledge the nature and quality and condition of the goods.

"The very nature of the bill of lading shows that it ought not to be signed until the goods are on board, for it begins by describing them as *shipped*. Buller, J., in *Lickbourn vs. Mason*, 2 T. R. 75, said: 'A bill of lading is an acknowledgment by the captain of having received the goods on board his ship; therefore, it would be a fraud in the captain to sign such a bill of lading if he had not received the goods on board, and the consignee would be entitled to his action against the captain for his fraud.'

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"It is not contended that the captain had any real authority to sign the bills of lading unless the goods had been shipped. Nor can we discover any ground on which a party taking a bill of lading by indorsement would be justified in assuming that he had authority to sign such bills, whether the goods were on board or not.

"If, then, from the usage of trade and the general practice of ship-masters, it is generally known that the master has no such authority from his position as master, the case may be considered as if the party taking the bill of lading had notice of an express limitation of the authority, and in that case, undoubtedly he could not claim to bind the owner by a bill of lading signed when the goods therein mentioned were never shipped.

"So, here, the general usage gives notice to all people that the authority of the captain to give bills of lading is limited to such goods as have been put on board, and a party taking a bill of lading, either originally or by indorsement, for goods which have never been put on board, is bound to show some particular authority given to the master to sign it." 2 Eng. S. and E. 337; 70 Eng. C. L. 665.

This decision settled the law in England, and it has been adhered to uniformly since. See *Hubberty vs. Ward*, 18 Eng. S. and E. 551; *Coleman vs. Riches*, 29 Eng. S. and E. 323; *Jesse vs. Bath*, the Law Reports, vol. 2, p. 267.

The same doctrine was asserted and maintained by the Supreme Court of the United States at the December term, 1855, in the schooner *Freeman vs. Buckingham*, 18 Howard.

Hickox owned the schooner. He sold her to John Holmes for forty-five hundred dollars, payable in installments, from June, 1851, to December, 1853. One of the installments had become due and was paid, Hickox obligating himself to make title when the price was paid.

John Holmes permitted his son, Sylvanus Holmes, to take charge of and employ the schooner as he chose, and Sylvanus put the captain and crew on board. He induced the captain to sign bills of lading for a quantity of flour consigned to libelants, which were intended to be and were used to obtain advances on the pretended shipment.

On the faith of these bills of lading the consignees, who lived at the city of New York, advanced a large sum to Sylvanus Holmes, who lived at Cleveland, Ohio. Thirteen hundred and sixty barrels of the flour mentioned in the bills of lading were not delivered, and were never shipped. The consignees proceeded against the schooner in admiralty, and Hickox intervened to claim and protect his property.

In the course of an able and elaborate opinion, the court said:

"A willful fraud, committed by the master on an innocent third person, by signing false bills of lading, would not be within his agency. If the

signer of the bill of lading was not the master of the vessel, no one would suppose the vessel bound, and the reason is, because the bill is signed by one not in privity with the owner. But the same reason applies to a signature made by a master out of the course of his employment. The taker assumes the risk not only of the genuineness of the signature and of the fact that the signer was master of the vessel, but also of the apparent authority of the master to issue the bill of lading. But the master of a vessel has no more an apparent, unlimited authority to sign bills of lading than he has to sign bills of sale of the ship. He has an apparent authority, if the ship be a general one, to sign bills of lading for cargo actually shipped, and he has also authority to sign a bill of sale of the ship, when, in case of disaster, his power of sale arises. But the authority, in each case, arises out of and depends upon a particular state of facts, and it is incumbent upon those who are about to change their condition, upon the faith of his authority, to ascertain the existence of all the facts upon which his authority depends." P. 191.

In *Fearn vs. Richardson*, 12 An., decided in 1857, and *Fellowes vs. Steamboat Powell*, 16 An., decided in 1861, the Supreme Court of Louisiana held that the master can not bind the owner by signing bills of lading unless the goods are actually delivered or put on board.

In the *Lady Franklin*, 8 Wallace, decided at the December term, 1869, the consignees were the owners of the goods. The intention was to ship them by the *Lady Franklin*, and the bill of lading was signed for that vessel without any fraudulent intent. Before the *Lady Franklin* arrived, by some mistake, the goods went on board another vessel of the same line which foundered on the voyage with the goods on board. The consignees libeled the *Lady Franklin* for non-delivery. The court said:

"The attempt made in the prosecution of this libel to charge this vessel for the non-delivery of a cargo which she never received, and, therefore, could not deliver, because of a false bill of lading, can not be successful, and we are somewhat surprised that the point is pressed here.

"In so far as a bill of lading is a contract, it can not be explained by parol, but if a contract, it is also a receipt, and in that regard it may be explained, especially where it is used as the foundation of a suit between the original parties, the shippers of the merchandise and the owner of the vessel.

"The principle is elementary, and it needs the citation of no authority to sustain it.

"The case of the schooner *Freeman vs. Buckingham* is decisive of this case. It is true, the bill of lading there was obtained fraudulently, while here it was given by mistake, but the principle is the same." P. 329.

The three cases last cited, unlike all the others, were not complicated with any question as to the right of an innocent third party advancing

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money on the faith of the bills of lading. The case of the *Lover*, however, decided in the Circuit Court of the United States, at New York, 1870, reported in 7 Blatchford, is like the *Massachusetts* and *English* cases, and the case of the schooner *Freeman* vs. *Buckingham*, in that respect.

Green owned the schooner *Lover*, lying at Baltimore. He sold the vessel to Gilley, who paid part of the price and agreed to pay the balance within five days after his arrival at New York. The master, who had been employed by Green, remained in command. Gilley took possession and put a cargo of lumber on board. Meeting Green on the street, he requested him to send the captain to the broker's office to sign the bills of lading. The master went to the broker's office, and, having no knowledge of the quantity of lumber on board, signed the bills of lading as requested by Gilley. Gilley took the bills of lading to New York and obtained large advances from the consignees. When the schooner arrived at New York it was found that she had not more than half the lumber on board called for by the bills of lading. The consignees proceeded against the schooner in admiralty, and Green intervened, claiming to be the owner, and that the schooner was not bound.

The court, citing *Grant* vs. *Norway*, *Hubberty* vs. *Ward*, *Coleman* vs. *Riches*, and the schooner *Freeman* vs. *Buckingham*, held that the master had no power to charge the owner or the vessel by signing bills of lading for cargo not on board.

In *Nelson* vs. *Woodruff*, 1 Black, S. C. U. S., a quantity of lard was shipped at New Orleans, consigned to *Woodruff & Co.* at New York. The bill of lading acknowledged the receipt of the lard in good order and condition. On the faith of the bill of lading the consignees made large advances on the shipment. It was found, on the arrival of the vessel, that there had been an extraordinary loss on the voyage, some sixty thousand pounds of the lard. The consignees refused to pay the freight and primage; and the carrier sued them. The consignees set up the short delivery, and claimed six thousand dollars in damages.

The court held, notwithstanding the clean bill of lading, and the large advances made by the consignees on the faith of it, that the carrier might prove that the loss resulted from inherent defects in the lard; that the acknowledgment of the receipt in good order and condition relates to the external appearance of the package, not to the actual internal condition, which could be ascertained by inspection alone, and that it does not conclude the carrier as to the actual condition, different from the apparent condition. The carrier is bound *prima facie* by the acknowledgment as to quantity and condition, and the burden is on him to show a less quantity, or a different condition. The court attached no importance to the fact that the consignees had made large advances on the faith of the bill of lad-

ing, and the carrier recovered his freight and primage. See, also, *Abbe vs. Colon*, 51 N. Y. 410.

Sears vs. Wingate, decided by the Supreme Court of Massachusetts in 1861, 3 Allen, 103, is also a very instructive case. Wingate, living at Boston, bought of Sturtevant, at Philadelphia, a cargo of coal, to be paid for on the receipt of the bill of lading. The master of the schooner, who was one of the owners, signed a bill of lading for 408 tons, and Wingate settled for that quantity of coal on receipt of the bill of lading, ten days before the arrival of the schooner at Boston. On weighing the coal at Boston it was found to be short about twelve tons. The owners of the schooner sued Wingate for freight on the quantity delivered, and he claimed a set-off for short delivery.

The court, reviewing the leading cases, laid down the following propositions, and maintained them on principle and authority:

First—"The receipt in the bill of lading is open to explanation between the master and the shipper of the goods.

Second—"The master is estopped, as against the consignee, who is not a party to the contract, and as against an assignee of the bill of lading, when either has taken it for a valuable consideration upon the faith of the acknowledgments which it contains, to deny the truth of the statements to which he has given credit by his signature, so far as those statements relate to matters which are or ought to be within his knowledge.

Third—"When the master is acting within the limits of his authority, the owners are estopped in like manner with him, *but it is not within the general scope of the master's authority to sign bills of lading for any goods not actually received on board.*"

There remained to be dealt with the important fact that the master, who signed the bill of lading, was one of the owners, one of the plaintiffs in the action. The court said:

"If the receipt in this bill of lading is to be considered a statement erroneously but not fraudulently made, respecting the quantity of goods really received, and not intended to include others not received, it would be open to the master as well as the owners to explain the error, because the master has no opportunity to ascertain the exact weight, and could not be supposed to intend to warrant it. *Shepherd vs. Naylor*, 5 Gay, 592. But if it were regarded as a receipting for property not on board, then the bill of lading would not be conclusive against the owners, and would be against the master."

The court proceeds to say that, under the circumstances, it would not be equitable to allow the claim of the defendant as against the plaintiffs, all the owners, on account of a fraud or misrepresentation of one of them, for which the others are not responsible. "There is no evidence to

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show what the contract between the owners was, or that the master had any authority to bind them, except that which resulted from his employment in that capacity."

There was, accordingly, judgment in favor of the plaintiffs for the freight.

The doctrine thus settled by the authoritative decisions which we have cited seems to be equally well settled in Louisiana by positive law.

By act of 1868, No. 150, section five, all carriers, and their agents, are forbidden to sign or give any bill of lading unless the merchandise or property "shall have been actually shipped and put on board, and shall be at the time actually on board, or delivered to be carried or conveyed as expressed in said bill of lading."

Section seven makes the violation of any of the provisions of this act "a criminal offense," punishable by fine not exceeding five thousand dollars, or imprisonment in the penitentiary for a term not exceeding five years, or both. Moreover, the person offending is liable to the party aggrieved for all damages, immediate or consequential, which he may have sustained by reason of such violation, whether the person offending shall have been convicted of fraud or not.

Section nine makes bills of lading "negotiable by indorsement in blank or by special indorsement, in the same manner and to the same extent as bills of exchange and promissory notes are."

"Whatever is done in violation of prohibitory law is void, although the nullity be not formally directed." C. C., art. 12.

This statute of 1868 not only prohibits the signing of a bill of lading for property not delivered for transportation, but makes it a crime, punishable with extraordinary severity, and subjects the offender to all the pecuniary damage which may be occasioned by his crime. It would be a waste of words to do more than assert that no one is bound by an act so highly criminal but the offender himself; and when section nine makes bills of lading negotiable, in the same manner and to the same extent as bills of exchange and promissory notes are, it means genuine bills of lading. It was no more the intention nor within the power of the Legislature to bind the carrier by a false bill of lading, or one signed for him by a person not authorized, than to make one liable as a party to a promissory note or a bill of exchange signed in his name by a person not authorized to bind him as the maker, or drawer, or acceptor, or indorser of a bill of exchange or promissory note.

The bill of lading is negotiable, that is, by indorsement the transferee acquires all the rights which the instrument creates against the carrier, just as the indorsement of a bill of exchange or promissory note vests in the transferee all the rights which the instrument creates against the prior parties.

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The bill of lading in this case was signed in the State of Mississippi, and the cotton was to be delivered at the city of New Orleans. We are not troubled with any question of the conflict of laws; because we are not advised that the law of Mississippi differs from our own, and the legal presumption is, and we must act upon it, that the law of that State is like our own in any given case where the contrary is not shown.

The apparent hardships to the consignee, or the innocent holder of the bill of lading, must be eliminated, and it can not be regarded as a factor in the solution when we remember that in all such cases the question is purely one of agency. He who advances money on the faith of a bill of lading, or who looks to a bill of lading as security, encounters the risks to which every other person is subject who deals on the faith of one professing to be agent for another. He is bound to know the extent of the agent's authority. If the agent exceeds his authority, if power has not been delegated to him to do the thing which he does, no matter how large may be the authority vested in him, the principal is not bound. The master of a ship, the agent of the carrier, to whom authority is delegated to sign bills of lading has no such power unless the goods have actually been received for transportation; and when he signs a bill of lading for goods not received, whether fraudulently or by mistake, he subjects himself personally to all the legal consequences of the act, but he is no more the agent of the carrier, in that behalf, than any stranger would be; and the carrier is not bound, because the person professing to be his agent was not his agent for that purpose.

These propositions are clearly laid down in or are plainly and logically deducible from the English and American cases cited; and the statute of Louisiana, and they are in perfect accord with well-established elementary principles in the law of agency and the law of carriers.

It follows that the station-agent did not bind the corporation, the railroad company, by signing a bill of lading for cotton which was not delivered to him for transportation, because he was not the agent of the company in that behalf.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed, and that there be judgment in favor of defendant, appellant, against the plaintiffs, appellees, rejecting the demand of plaintiffs, with costs in both courts.

MANNING, C. J. I concur in the opinion of Mr. Justice Marr.

CONCURRING OPINION.

EGAN, J. The account of plaintiffs with Mitchell & Co., and other evidence in the record, justify the conclusion that the credit of the

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latter firm with plaintiffs would not at the time have been materially affected by the reception or non-reception of ten bales of cotton more or less. The error which led to duplicate receipts or bills of lading was as much attributable to Mitchell & Co. as to the agent of defendants. The cotton was consigned to plaintiffs as commission merchants of Mitchell & Co., and for account of Mitchell & Co., whose credit with plaintiffs resulted not from this single transaction, but was established long before and continued long after. Mitchell & Co. are to be the real beneficiaries by this action. Its fruits, if any, would go to their credit, which I do not think either equitable or legal under the facts of this case. We can not consider plaintiffs as third parties in this matter. Were they so, however, and whatever the scope and effect of the statute of 1868 declaring bills of lading negotiable, the reception of two bills in so short a time, both containing cotton not only of the same marks but of the same numbers, was certainly enough to put plaintiffs upon inquiry. This is more apparent from the evidence of Hunt, himself, who says: "After the railroad failed to deliver fourteen bales, I had a suspicion that some of the bales had been receipted for twice." He also says: "*Receipts were put on file when received, and the cotton entered when received,*" thus showing double examination of the bills and the caution of a good business house in not dealing with cotton as received till arrival, notwithstanding the bills of lading were in hand. I concur in the decree rejecting plaintiffs' demand and in favor of the defendants.

DISSENTING OPINIONS.

SPENCER, J. I can not concur with the majority of the court in this case. The plaintiffs, merchants of New Orleans, bring this suit by attachment against the defendant, and garnishee certain funds in the hands of the New Orleans and Jackson Railroad Company.

They allege that the firm of J. W. Mitchell & Co., of Goodman, Miss., consigned to them, and that the defendant receipted for, ten bales of cotton on the eighteenth of December, 1869, thirty-three bales on the first of January, 1870, six bales on the fifteenth of January, 1870, and eight bales on the twenty-fourth of January, 1870; that the receipts or bills of lading of said railroad for said cotton were transmitted to them, and that they on the faith thereof, and in the usual course of their business, made advances to said Mitchell & Co. to the full value of said cotton; that the said Central Railroad failed to deliver to them according to the tenor of said bills the following list of bales of the weights and value following:

2 bales cotton, A J, January 1, weighing 1080 lbs.
 1 bale cotton, E C; January 1, weighing 590
 1 bale cotton, J B L, weighing 465
 6 bales cotton, J J G, weighing 2505
 1 bale cotton, C C, January 5, weighing 390
 1 bale cotton, S R in a square, January 24, 425
 2 bales cotton, E H in a square, Dec. 18, '69, 820

14

6225 lbs. @ 23 $\frac{1}{4}$ c.=1478 43.

They therefore ask judgment for the said sum of \$1478 43, with interest and with privilege on the property attached.

The defendant answers by a general denial, and specially alleges that ten (10) of the fourteen bales sued for, to wit: six marked "J J G," two marked "A J," and two marked "E H" in a square, were not in fact delivered to or received by defendant as stated in said receipt of January 1, 1870, and that it was an error on the part of the person signing said receipt to include said ten bales therein; that said receipt should have been for twenty-three (23) bales only, and that defendant is liable under said receipt for twenty-three bales only; and that defendant duly delivered or accounted for the twenty-three bales for which it was liable; and as to the remaining four bales sued for, two of them, marked "E C" and "S R" in a square, were actually delivered to plaintiffs, and the other two marked "J B L" and "C C" have been fully settled for with plaintiffs by defendant permitting them to retain two other bales marked "J T," which were delivered to plaintiffs in error, instead of to W. B. Thompson, the consignee, who was paid for the said two bales marked "J T."

There was judgment in favor of plaintiffs for \$1273 32 and defendant appeals.

It is admitted that plaintiffs correctly state the weight and value of the cotton. The two bales marked "J T" are shown by plaintiffs' account sales to have netted two hundred and five dollars, which was by plaintiffs carried to the credit of J. W. Mitchell & Co. The defendant was clearly entitled to credit for these two bales, and as they stood in lieu of two belonging to Mitchell & Co., which were lost, Mitchell & Co. were, of course, to be credited with their proceeds. Any other course would have made plaintiffs clear gainers of these two bales. We see no reason why plaintiffs should complain. The evidence clearly shows that Mitchell & Co. did not ship them to plaintiffs, who produce no bill or receipt of the railroad for them. The district judge correctly credited defendants with their proceeds.

I presume, by oversight the district judge failed to credit defendant with the two bales marked "S R" in a square and "E C," which the testimony of Hunt, one of the plaintiffs, admits were delivered or ac-

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counted for. Their weight was 1015 pounds, which at 23½ cents amounts to \$241 06, for which defendants should have credit.

There remain, therefore, only ten bales in controversy, to wit: Two marked "A J," six marked "J J G," and two marked "E H" in a square.

The defendant says that by error double receipts were given for these bales, once on the eighteenth of December, 1869, and again on the first of January, 1870, by including them in the receipt for thirty-three bales, and, we think, evidence establishes that allegation. The two receipts, when compared, show it. The one of the eighteenth of December is for these ten bales, and that of the first of January bears ten bales, of the same numbers and marks. Besides, the defendant's agent at Goodman swears positively to the fact, and satisfactorily explains how it happened. He also states that Mitchell some time after admitted the error, saying his books only disclosed one lot of cotton bearing the same brands. If this controversy were between the shipper and the defendant, there would be no room to doubt the right of defendant to relief. But the plaintiffs allege, and prove, to my satisfaction, that in the course of their business and on receipt and faith of these bills of lading, they advanced in good faith to the shipper thereon to the full value of the cotton represented by them. The receipt of the bills was by law equivalent to the receipt of the cotton, so far as related to plaintiffs' rights for advances made. The law in the interests of commerce, and in order to give security to business transactions, has thrown peculiar guards around the rights of persons advancing money on such bills. To allow the carrier to dispute the truth of his bills in the hands of innocent parties who in good faith had advanced upon them, would be to destroy all confidence, upon which commerce so much depends. We understand the better opinion to be that "as between the shipper and carrier a bill of lading is open to explanation and correction; but that as between the carrier and a third person holding it for a valuable consideration it is not." See *Dickerson vs. Seelye*, 12 Barb. 102; *Parsons Mercantile Law*, 347.

The case of *Buckingham vs. Freeman*, 18 How. 188, has been referred to as announcing a different doctrine. But upon an examination, we do not think so. In that case the owner of a vessel agreed to sell it to John Holmes, reserving mortgage and lien for the unpaid price. John Holmes gave up the entire control of the vessel to his son, Sylvanus Holmes, who was doing a commercial business under the name of S. Holmes & Co. The son, S. Holmes, appointed the master, whom he induced to fraudulently sign bills for an invoice of flour, upon which S. Holmes & Co. got advances from the plaintiffs, who, upon non-delivery of the flour, libeled the vessel, claiming a lien on it. The original owner (vendor) intervened, claiming that his rights were superior to libelants'. The court says the questions are, have the libelants a lien on the vessel

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under the maritime law, and is the general owner estopped from showing the truth, as against a *bona fide* holder of the bills procured from a master by fraud of an owner *pro hac vice*. The court seems to predicate its decree rejecting the claims of libelants, on the grounds that they have no lien under the admiralty law, and that the master who signed the bills was not the agent of the claimant, the original owner (vendor); that the real owner, the claimant, was not personally liable for the bills, and by the admiralty law the vessel was bound only when he was.

We are aware that there has been, and perhaps still are, conflicting opinions as to the extent of the liability of carriers toward third persons taking or advancing upon their bills of lading; and that the prevailing doctrine in England is that they are not liable for goods not actually delivered to their agents. But we have seen that at least some high American authority lays down a different doctrine, which, however, is not every where accepted in this country. It may therefore be fairly said that the question is not a settled one here, and we think it our duty to accept that view which seems most in consonance with our own laws, and best calculated to give security to commerce.

In the case at bar the defendant does not dispute the authority of its agent at Goodman to sign bills of lading. Nor, indeed, could it successfully do so; for it would indeed be strange if a carrier could hold out to the public that a certain person was its agent to receive goods for transportation, and for months execute the contracts of affreightment made by him, and then, when loss or damage results from the negligence of that agent, dispute his authority. It is a proper occasion to apply the familiar rule, commended alike by law and reason, that "when one of two innocent persons must suffer, he, who, by occasioning the confidence, has created the loss, shall bear it. 3 An. 400; 4 An. 19. The question as to the extent of the powers of the master of a ship under the maritime law I do not feel called upon to discuss, as I think there is a clear distinction between that question and the one in this case, which relates to the authority of a railroad station-agent. Nor am I disposed to perplex myself with the long discussions and subtle distinctions of the writers on this subject. I think the statutes of our own State indicate with clearness the line of decision for us.

The act of 1868, No. 150, after forbidding the execution of warehouse receipts or bills of lading for goods or merchandise, unless the same shall have been actually delivered or shipped, and denouncing heavy penalties for violation of the prohibition, extending even to punishment for five years in the Penitentiary, proceeds, in its sixth section, to provide that the holder of such receipts or bills of lading shall be deemed owner of the merchandise described therein.

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Section nine provides that "all receipts, bills of lading, vouchers, or other documents, issued by any * * * boat, vessel, or railroad * * * as by this act provided, shall be negotiable by indorsement in blank, or by special indorsement, in the same manner and to the same extent as bills of exchange and promissory notes now are."

The animus of this statute is unmistakable. It was intended to protect both the carriers and the public—the former by punishing any persons in their employ for issuing false bills of lading or receipts, and the latter by putting such bills or receipts upon the same footing as commercial paper, and protecting the holder in good faith with all the privileges and immunities given to bills of exchange and promissory notes. I feel constrained therefore to hold that the agent of defendant, at Goodman, had authority to sign bills of lading for his principal, and that that bill, in the hands of the plaintiffs, can not be shown to have been given for a larger amount than defendant received. I think the judgment appealed from, less the credit stated herein, should be affirmed.

DEBLANC, J. Instead of giving but one bill of lading for twenty-three bales of cotton actually delivered, defendant's acknowledged agent gave two bills of lading, one in December, 1869, the other in January, 1870, for all together thirty-three bales.

In the course of their usual business, on the faith of these bills of lading, plaintiffs advanced the full value of the cotton which said agent thus declared to have been received and shipped.

For every act of the agent, performed by him within the scope of his authority, the principal is bound. In this case, the bill of lading was signed by one expressly employed to sign those bills. For his errors who must suffer? Is it those who, deceived by the error, have disbursed and advanced their money, or is it the principal, who vouched for and guaranteed a proper and correct exercise of the delegated authority, a strict and faithful discharge of every duty imposed by the mandate? The principal's signature to the bill of lading would not have more effectually bound him than did the signature of his chosen, his recognized, agent.

He is bound under the general rule; he is also bound under the act of 1868. Under that act the bill of lading, as a bill of exchange or a promissory note, "may be transferred by indorsement, and any person to whom the same may be transferred shall be deemed and taken to be the owner of the produce or commodity thereon specified, so far as to give validity to any pledge, lien, or transfer made or created by the holder of the same. That no printed or written condition or clause inserted or attached to

any bill of lading, which in any way limits the liability imposed by this act, shall have any effect or force whatsoever."

Through its agent, the railroad company certified to plaintiffs that thirty-three bales of cotton had been shipped. On transfer to them of that certificate they advanced the entire value of the cotton, which, according to the agent's declaration, had been delivered to, received, and shipped by defendant. If, under these circumstances, the company is not liable, a carrier's agent, without receiving a single bale of cotton, may attest that he has received one thousand bales, discount the bill of lading, retain the proceeds of the discount, do this under color and by virtue of his agency, and not bind his principal!

In this case there was no intention of deceiving plaintiffs. This we admit, but, so far as third parties are concerned, what difference would there be between the error or fraud of an agent? If not liable for the error, the company would not be liable for the fraud, and the bill of lading would lose its value, become a snare, a suspected and dangerous instrument.

To decide the question presented it is useless, it seems, to refer to the jurisprudence of other States; we have but to open and read the statute of 1868. It was enacted for the express purpose of fixing, in and for Louisiana, the legal value of a bill of lading. With the provisions of that law planters and merchants are now conversant. The bill of lading has the value of a sale, the stipulation of which can not be changed, can not be limited, except in one way, that indicated in the statute; that is by the words "*not negotiable*" plainly written or stamped on its face. No other reservation, written or printed, shall have any force or effect whatsoever. These are the terms of the statute.

The law of 1868 was enacted in the interest of commerce; it created one of the most important branches of our credit; it secures the most legitimate transaction; it sanctioned, legalized, and perfected a fair but imperfect custom which prevailed before its adoption, and it is by far wiser and more equitable than the vacillating and doubtful jurisprudence of other States. It guards against carelessness and error, against surprise and deceit, against forgery and fraud. If, as to third parties, it could be explained or contradicted, the bill of lading, though negotiable, could but seldom be negotiated.

If, as provided in the law of 1868, the carrier can not take advantage of any written or printed reservation attached in advance to a bill of lading, of a reservation apparent to all, how could it be allowed to take advantage of that which not only is not written, printed, or apparent, but which, if admissible or admitted in evidence, would entirely or partially contradict the absolute terms, the positive figures of a bill of lading? For instance, were the agent to write across the bill the declaration that

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the principal is not responsible for the quantity thereon specified, would that declaration justify the delivery of less than the expressed quantity? Most assuredly not.

As to the holder of a bill of lading, the only inquiries should be, does the instrument bear the signature of a real, a recognized, a proper agent? If it does, then did that recognized agent appear to have acted within the scope of the delegated authority? If he did, the instrument, whether delivered through error or fraud, is binding on the carrier. The error or fraud of an agent is not to be visited on the victims of his negligence or infidelity, but on those who created the trust; otherwise the negotiable instrument shall cease to be, as it now is, a letter of credit, a proclamation, to every purchaser or transferee, that all it contains is right.

For these, and the reasons by him alleged, I concur in the opinion delivered by his honor, Mr. Justice Spencer.

No. 6338.

29	465
123	327
123	523

CHARLES A. CONRAD VS. JOSEPH PATZELT. JAMES JACKSON, INTERVENOR
AND THIRD OPPONENT.

A lessee whose property has been provisionally seized, may release it by giving one of three different kinds of bond:

First—He may give a bond, whose amount is to be fixed, on his application, by the judge, conditioned that he will satisfy whatever judgment may be rendered against him, or, return the property.

Second—He may give a forthcoming bond, for the amount of the claim, or value of the property, to be ascertained by appraisement.

Third—He may give an *absolute* bond to satisfy whatever judgment may be rendered against him, *embracing no obligation in the alternative*.

The release bond given by the lessee, in order to recover possession of the property provisionally seized, is the substitute for, and stands in the place of the property, and any subsequent lessor, who acquires a lien on said property, possesses a lien superior to that of the lessor whose seizure has been released.

After fifteen days from the removal of the lessee's property from the leased premises, the lien of the lessor is prescribed.

A lessor who has a lien on goods on his premises seized, and sold under a *fiery facias*, may intervene by rule, and claim to be paid by preference out of the proceeds.

A PPEAL from the Fifth District Court, parish of Orleans. *Cyllum*,
J.

Charles A. Conrad and *James Brewer*, for plaintiff and appellee.

I. Tharp, for defendant.

J. Ad. Rozier, for intervenor.

The opinion of the court was delivered by

MARR, J. Joseph Patzelt leased from Charles A. Conrad the store No, 172 Camp street, for the term of one year, ending the thirty-first of

October, 1874, for nine hundred and sixty dollars, payable monthly, represented by twelve notes of eighty dollars each.

At the expiration of the term seven of these notes remained unpaid. Patzelt declined to renew the lease at a reduced rate, and held over, with the understanding that he was liable to be turned out at any time if Conrad should find a tenant by the year.

Patzelt leased the store No. 57 Camp street from James Jackson, and on the eleventh of March Conrad, having learned that he was about removing from No. 172 Camp street, brought suit for the rent due him, say, for seven months up to the expiration of the lease and for five months after, up to April, 1875, in all nine hundred and sixty dollars; and he caused to be provisionally seized the furniture and effects which still were on the premises No. 172 and those which had been removed to No. 57 Camp street.

On the thirteenth of March counsel for Patzelt obtained an order of court that "defendant be allowed to bond the seizure on furnishing good and solvent security in the sum of one thousand dollars, conditioned as the law directs."

On the same day Patzelt gave bond in favor of the sheriff, for one thousand dollars, with security, "the condition of which is such that if the said defendant shall satisfy such judgment as may be rendered against him in the suit pending, as above mentioned, then this obligation to be void, or else to remain in full force."

The surety justified under oath, and on the same day the sheriff transferred the bond to the plaintiff, Conrad, as the law requires.

On the seventeenth of March the plaintiff, showing to the court that "the bond furnished by the defendant, upon the execution of which the release of the property provisionally seized in this suit was ordered, is insufficient in amount and is not such a bond as is required by law in such cases," took a rule on defendant to show cause why "he should not furnish bond in the sum of two thousand dollars, conditioned according to law."

This rule was submitted on the admission of Patzelt that the property provisionally seized was of a value not less than three thousand dollars, and the admission by Conrad that the bond already filed was "sufficient in amount to cover the amount claimed, with interest accrued to the date it was filed."

The court ordered defendant to furnish bond in the sum of fifteen hundred dollars, "conditioned as the law directs," and on the twenty-fifth of March defendant gave a new bond, with the same surety, who again justified under oath. The second bond was immediately transferred by the sheriff to the plaintiff, and it was identical with the first in all respects except as to the date, the twenty-fifth of March instead of the thirteenth,

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and the amount, fifteen hundred dollars instead of one thousand dollars.

The suit was contested, and final judgment was rendered in November, 1875, on which a writ of *fiery facias* issued on the fourteenth of December, under which the sheriff seized and advertised for sale on the third of January, "all the furniture and movable effects contained in the premises No. 57 Camp street."

On the thirtieth of December, before the sale, James Jackson filed his petition of intervention and third opposition, stating that he had let the premises to Patzelt, by lease in writing, for a term beginning the fifteenth of March, 1875, and ending the fifteenth of September, 1876, on account of which Patzelt was indebted to him in the sum of four hundred and fifty dollars for three months rent due and thirteen hundred and fifty dollars for nine months rent to become due, and he claimed a lien, privilege, and right of pledge on the movables seized, and prayed for judgment to be paid out of the proceeds of the sale about to be made by the sheriff.

The sheriff did not remove the property, but sold it on the premises, No. 57 Camp street, which Patzelt had occupied under the lease from Jackson from March, 1875, up to the sale, third of January, 1876.

The judgment of the court below dismissed the claim of Jackson so far as Conrad was concerned, but awarded him, as against Patzelt, the full amount sued for; and the case comes up on Jackson's appeal.

On the trial Jackson's counsel took a bill of exceptions to the ruling of the court in refusing to allow him to prove that the surety on the release bond was well able to satisfy the obligation. The rights of the parties do not depend on the sufficiency of the surety. The surety justified, and, if the question were of any importance, as it is not, the legal presumption would be, in the absence of proof, that no change had taken place in his condition.

It was suggested in argument and in the printed brief of counsel for appellee that there had been laches and negligence on the part of Jackson in allowing Patzelt to become so largely indebted to him. If there were any force in this it would be somewhat diminished by the fact that Patzelt was in arrears to Conrad for twelve months rent, nine hundred and sixty dollars—seven months under the lease and five months under the reconduction—while he owed Jackson for rent due four hundred and fifty dollars, for three months only.

Again, it is urged that Jackson had notice of Conrad's rights; that the suit was notice; and, as part of the furniture was seized in the store let by Jackson to Patzelt, he must be presumed to have had actual knowledge.

So far as notice by suit is concerned, the correct rule seems to be this: where the title to property is in litigation, or where, there being no

dispute as to the title, property is under seizure and remains *in custodiam legis* to enforce some right or lien or privilege upon it, the pendency of the suit is notice to this extent, that no one can acquire from or against one of the parties any right or title in or to the property to the prejudice of that which may be awarded to the other party by the judgment. This is not because of any presumption of actual knowledge, but it is because the law, having laid hold on the property for the purposes of the suit, will not permit the ends of justice and the rights of those who have invoked its aid to be thwarted or defeated by transfers or changes or divestiture of title *pendente lite*. The reason of the rule ceases, and the rule itself is no longer applicable, when the law allows a bond to be substituted for the property, when the seizure is released, and when the law relinquishes its grasp on the thing itself and permits the owner, or person claiming to be the owner to resume the control and power of disposal of which he had been temporarily deprived by the seizure.

The fact that part of the furniture had been seized in the store leased to Patzelt by Jackson does not create even a presumption that he had actual knowledge. The notes which Patzelt gave to Jackson for the rent were dated the seventeenth of February. The date seems to have been omitted in the lease, but the term commenced on the fifteenth of March. The inference is that the contract of lease was agreed upon, most probably it was signed, on the day of the date of the notes, which are in accordance with its terms, one hundred and twenty-five dollars a month from the fifteenth of March to the fifteenth of September, and one hundred and fifty dollars a month for the ensuing year. It is quite common, in all respects regular and lawful, for parties to sign contracts of lease and rent notes, for a term to begin at a later date; and if this contract was concluded and signed on the seventeenth of February, as the date of the notes indicates, there was no occasion for Jackson to be on the premises when Patzelt took possession, and there was no reason why the keys should not have been delivered to Patzelt as soon as the contract was completed. At any rate, Patzelt must have had the keys before, as he commenced moving on the eleventh of March, and it would have been a mere accident if Jackson had happened to be on the premises and to have known of the seizure.

If Jackson is to be charged with notice by reason of the suit, he must have the benefit of the information afforded by the proceedings in the suit, that the rent claimed by Conrad was only nine hundred and sixty dollars; that Patzelt had given security to cover that amount; that the seizure had been released; and that the property seized and which was removed into his store was of a value not less than three thousand dollars.

These considerations are by no means determinative. Two lessors

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claim a fund which is not sufficient to pay the rent due to both. One of them, Conrad, brought suit for the rent due him and caused the property subject to his right of pledge to be provisionally seized. The other, Jackson, acquired a right of pledge on the same property after this seizure had been set aside or released on bond, ample in amount, with good and solvent security, conditioned to satisfy such judgment as might be rendered in the suit; and the fund for which they contend is the proceeds of that property, sold by the sheriff under *feri facias*, issued upon the judgment obtained by Conrad, for the rent due him, in the suit in which the provisional seizure was made. It becomes necessary therefore to ascertain what were the rights of Conrad, and what were the rights of Jackson, with respect to this property at the time it was seized by the sheriff, and sold under the *feri facias*.

When we consider how much of the property in the city of New Orleans is occupied by lessees who give no other security for the rent than that afforded by the movable effects which they put into the leased premises, the importance of the issues thus presented for solution will be fully appreciated.

The judge of the court below and the counsel for appellee call the release bond given in this case a *forthcoming* bond. It may be of much more importance to ascertain the effect of the bond than to inquire as to the name by which it shall be designated. Nevertheless, it is well to see whether this is really a forthcoming bond.

In some of the States where property seized under execution is claimed by a third person, he is allowed to retain it in his possession on giving bond to abide the result of a trial of the right of property; and the defendant in execution is also allowed to retain the property seized until the day of sale, on giving bond to have it forthcoming at that time.

We have, also, a forthcoming bond, which, by the act of 1842, re-enacted in 1855, p. 477, and in Revised Statutes, section 3411, the defendant in execution whose property has been seized is permitted to give, and, on giving it, he is allowed to retain the property in his possession until the day of sale.

A forthcoming bond has for its object the delivery of the property described, and there can be no such thing as a forthcoming bond without a description of the property, so that it can be identified, and a stipulation for the delivery of that property at a specified time and place, for a specified purpose.

It will be observed that the amount of the forthcoming bond has no reference to any debt to be paid. It stipulates for the delivery of the property; and as the object is to secure that delivery, the amount is fixed solely with reference to the value of the property, sufficiently above the value to cover it fully in case of default.

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No one can read the bond given in this case and call it a forthcoming bond in any legal sense of that term. The only description it contains of the property seized is: "The furniture and movables in the premises No. 57 Camp street and No. 172 Camp street;" and it recites that the property thus described had been provisionally seized, and the seizure set aside and the property released on defendant giving this bond, the condition of which is absolutely and unqualifiedly to satisfy such judgment as may be rendered against him in the suit.

But, it is said this bond must be interpreted with reference to the law under which it was given; and if it does not stipulate for the return of the property, that stipulation must be supplied. It is true that where the law or the order under which a bond is given prescribes the condition, the court may well reform it, and make it what the law or the order requires. But, where the law permits a party to give a bond with alternative conditions, he may select one of the alternatives and omit the other.

The Code of Practice gave the right to seize provisionally in certain cases, but it did not authorize the defendant to have the seizure set aside or released on bond, as in cases of attachment and sequestration. Ships and other vessels were subject to this seizure; and as the law did not permit the release on bond, masters and owners were subjected to great inconvenience and hardship, being compelled either to pay the demand on which the seizure was made, however unjust it might be, or to keep the vessel at the wharf idle until the suit could be decided. The Legislature applied the proper remedy by amending the Code of Practice, and providing that "whenever ships or other vessels are provisionally seized the defendant shall be permitted to have the seizure set aside on executing bond in favor of the plaintiff, as in cases of attachment." Act of 1839, No. 53, section 12.

Referring to the Code of Practice, as it was at that time, it will be seen that the condition of the release bond in cases of attachment was absolute, without qualification, that defendant "will satisfy such judgment as may be rendered against him in the suit pending." Original article 259.

In 1852 article 259 was so amended as to allow defendant to have the property attached released on giving bond conditioned to "satisfy such judgment, to the value of the property attached, as may be rendered against him in the suit pending." Of course, bonds given for the release of ships and other vessels provisionally seized were subject to this modification. Thus the law stood; and property provisionally seized for rent could not be released on bond. There was some reason for this. The law gives the lessor, "for the payment of his rent, a right of pledge on the movable effects of the lessee which are found on the property leased." C. C. article 2705 (2675), and he "may take the effects themselves and

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retain them until he is paid." Article 3218 (3185). When property provisionally seized, or seized on any other mesne process, is released on bond, it is not in legal custody, and it returns to the possession of the defendant precisely in the condition in which it was seized, except that, *quoad* that seizure, the bond has been substituted for it, and it can not be seized again under the same writ.

The law authorizes the lessor, in case the movables on which his right of pledge exists have been removed from the leased premises, to pursue and seize them within fifteen days, provided they can be identified and continue to be the property of the lessee. C. C. article 2709 (2679). And if the effects provisionally seized for rent should be released on bond, the defendant, the lessee, might sell them, or might put them into other premises, leased from another lessor, so that the first lessor could no longer exercise his right of pledge, and he would be compelled to give up his security on the property itself and to look to the bond alone, which the law has permitted to be substituted for the property. The right of pledge exists so long as the property remains on the leased premises, and it may continue for fifteen days after the removal; but if it has been removed, and the fifteen days have elapsed, the right of the lessor is gone, and he has no higher or different claim upon the property than any other ordinary creditor.

No doubt the peculiar nature of the right given to the lessor caused seizures for rent to be excepted from the operation of the remedial statutes, which permitted the release on bond of property provisionally seized to enforce mere privileges. The precise object of the provisional seizure by the lessor is to prevent the removal of the effects out of the leased premises, which might be fatal to his rights; and there was apparent incongruity in the lessor's right of pledge and right to keep the property until his rent was paid, and the right of the lessee to have the provisional seizure of the property, to enforce the lessor's rights, released on bond. The law would not, therefore, permit the property subject to the lessor's right to be taken out of his control, except to go into legal custody, to be detained, condemned, and sold for the benefit of the lessor.

But at length the Legislature, sole judge in questions of policy and expediency, chose to put all defendants whose property might be provisionally seized on the same footing, whatever might be the cause of the seizure. By act approved the sixth of July, 1867, it was provided that "whenever ships, vessels, or any other property are provisionally seized, the defendant shall be permitted to have the seizure set aside on executing his obligation, with a good and solvent security, for whatever amount the judge may determine as being equal to the value of the property to be left in his possession, or the condition of said bond to be that he will

satisfy such judgment as may be rendered against him, or return the property."

This section figures as part of the Code of Practice, article 289, third clause, the word "or," italicised above, between the word "possession" and the words "the condition," being omitted. There can be no doubt that seizures for rent are subject to this law, and this court so decided expressly in *Lepretre vs. Barthet*, 25 An. 124.

The Legislature thought proper to make another amendment to the Code of Practice, by act approved the ninth of September, 1868. This act relates exclusively to provisional seizures at the instance of lessors; and it *permits* the lessee in all cases to have such seizure released "upon executing a forthcoming bond or obligation with a good, solvent security for the value of the property to be left in his possession, or for the amount of the claim, with interest and costs; provided further, that the value of the property shall be fixed by the sheriff, or one of his deputies, with the assistance of two appraisers, selected by the parties, twenty-four hours notice being previously given to the lessor or his counsel to select an appraiser."

This act now forms part of the Code of Practice, article 287. It in no manner conflicts with the act of the sixth of July, 1867, now part of the Code of Practice, article 289, and both are in force. The effect is that, no matter what property may be provisionally seized, whether at the suit of a lessor, for his rent, or of any other person, for any other of the causes specified in the Code of Practice, the defendant is *permitted* to have the seizure set aside on giving bond for whatever amount the judge may determine, conditioned to satisfy such judgment as may be rendered against him or restore the property. If the defendant desires to avail himself of the *permission* granted him by this act, he must apply to the judge to fix the amount of the bond.

The act of 1868 is restricted to seizures by lessors; and it permits the lessee to have the seizure released on giving a forthcoming bond or obligation for the value of the property or the amount of the claim, with interest and costs. If the lessee should prefer to avail himself of this act, the law makes it the duty of the sheriff, where the bond is to be for the value of the property, to fix the value by an appraisement, in which both parties are represented; and no action by the judge is required, and no application is to be made to the judge.

In this case the value of the property was so much in excess of the amount of the claim that defendant had no occasion to give a forthcoming bond, or to incur the expense and delay of an appraisement. He was a dealer in furniture; and the property seized was his stock in trade, merchandise which he was actually removing into the premises recently leased by him. His business was necessarily suspended, and

the removal of his goods stopped while the seizure lasted; and he preferred to avail himself of the act of 1867, because it was more expeditious, and more economical. It was the work of a few minutes only, an *ex parte* proceeding, in open court, or at chambers, to have the amount of the bond fixed by the judge; and nothing more was to be done after that but for the defendant to go to the sheriff's office with his security and sign the bond.

The mere wording of the bond shows that the sheriff understood that he was acting under the law of 1867; he adopted its phraseology, and he observed all its requirements, taking the bond upon the order of the judge, and for the amount fixed by him.

We have designated these two acts, the one as the act of 1867, the other as the act of 1868; but it will be observed that the act of 1868 forms part of the Revised Code of Practice, article 287, while the act of 1867 is part of article 289. The Revised Code of Practice was adopted as a whole, as a single act of the Legislature, approved on the fourteenth of March, 1870; and if there should be any conflict in these two articles, article 289 must prevail, because it is the last expression of the legislative will.

There is no conflict however. By article 289 the defendant in any case of provisional seizure may have the seizure set aside on giving bond in an amount to be fixed by the judge, conditioned to satisfy such judgment as may be rendered against him, or return the property. By article 287 the lessee may have the seizure released on giving a forthcoming bond or obligation for the value of the property or the amount of the claim. Both are remedial statutes; one applies to every possible case of provisional seizure, the other is applicable to seizures by lessors alone. Both are intended for the convenience and benefit of the defendant alone; and he may avail himself of the relief afforded by the one or the other, as his interest and convenience may require.

It was to the interest of defendant to give the bond in the form in which it appears; and this was his deliberate choice. It is not possible to admit any other hypothesis, when we remember, in addition to what has just been stated, that defendant gave two bonds, one on the thirteenth, the other on the twenty-fifth of March; that these bonds are identical, except as to dates and amounts; and that defendant had the benefit of the advice and assistance of his counsel in fixing the amounts and giving both bonds.

If a defendant is *permitted* to give a bond with an alternative condition, what law, what reason, forbids him to select that one of the alternatives which best accords with his interest and his convenience? By the act of 1868, defendant might have given a forthcoming bond; but he was not compelled to do so. This act, like that of 1867, is

permissive, not mandatory. The great relief which these two acts had in view, the great change which they effected, was in permitting the defendant, in any and all cases of provisional seizure, to have the seizure set aside on bond; and while the one act permits this to be done by a bond conditioned to satisfy such judgment as may be rendered or return the property, and the other permits the lessee to give a forthcoming bond, neither act forbids the defendant to give a bond conditioned, absolutely, to satisfy such judgment as may be rendered against him, or declares such a bond to be invalid.

Defendant did not give a forthcoming bond; he chose to give a bond to satisfy such judgment as might be rendered against him. If he had chosen to give a bond conditioned to satisfy such judgment or return the property, it would have been no better security than the bond which was actually given, since it would have been entirely at the option of defendant whether to have satisfied the judgment or to have returned the property, if he could have done so. If a person who has given a bond, conditioned to do one or the other of two things specified, may discharge his obligation by doing one of them, it is not possible to suggest any good reason why he might not legally and validly have made his election *in limine*, and have omitted one of the alternatives, as was done in this case.

In *LePretre vs. Barthet*, 25 An. 124, the lessee gave a bond conditioned precisely as the bond is in this case. In a suit against the surety, it was objected that no law authorized the bond. The court said it was authorized by the act of the sixth of July, 1867; and the judgment of the court below against the surety was affirmed.

If we undertake to reform the bond in this case by inserting the words in the condition, "*or return the property*," we shall incur the risk of making a contract for the parties, which they did not choose to make for themselves, instead of interpreting and giving effect to that which they actually did make.

The bond is not a forthcoming bond; and it is to no purpose to say that the defendant had a right to give a forthcoming bond. The fact still remains that he did not give a forthcoming bond; and our business is to ascertain what he did, not what he might have done, in the free exercise of his will and election.

But, call this bond what we may, what was its effect? The act of 1839 permits the defendant to have the seizure set aside; the act of 1867 permits the defendant to have the seizure "*set aside*," and the act of 1868 permits the lessee to have the seizure "*released*." Whether the seizure be "*set aside*," or whether it be "*released*," the property ceases to be in the custody of the law; and it returns to the possession of the defendant, precisely as if no such seizure had been made.

The proceeding *in rem* in the admiralty is quite analogous to our provisional seizure. The admiralty warrant lays hold on the ship or other property, and retains it in legal custody until some one appears and claims it, and procures it to be released on bond. When the bond is given, the property is restored to the claimant; and it goes into his possession precisely as if no such seizure had been made, and subject to the liens existing at the time the seizure was made, except that the bond has taken the place of the property, with respect to that seizure, and the property is released from the lien under which that seizure was made. Other liens existing at the time, or those that may be after acquired, will be preferred to the demand secured by the bond. See the "Timor," 4 Blatchford 93, decided by the late Justice Nelson of the Supreme Court of the United States. The "T. P. Leathers," 1 Newberry 432; 4 Abbott's Digest, No. 488; Benedict's Admiralty Practice, sections 447, 497.

In Brandon vs. Bobo, 12 An. 616, where property was seized under execution, and the defendant gave a forthcoming or delivery bond under the act of 1842, Revised Statutes, sec. 3411, the court held that he might validly sell the property before the day fixed for the delivery, and that it could not be pursued in the hands of the vendee. In such case the only recourse of the sheriff or of the seizing creditor is on the bond.

In Harralson vs. Boyle, 22 An. 210, a provisional seizure was made for rent, and the defendant gave bond under the act of 1867, conditioned to satisfy such judgment as might be rendered or return the property. Subsequently, he sold part of the property. The lessor, having obtained judgment for his rent, about three months after the provisional seizure, with recognition of his privilege, seized, under *feri facias*, the property which had been sold by the lessee after the release on bond. The court said the lessor's right to follow the property which had been removed from the leased premises continued for fifteen days only; and the title of the purchaser was maintained. Whether the property has been provisionally seized and released on bond, or whether it has not been provisionally seized, the lessor's right ceases at the expiration of fifteen days after the removal from the leased premises.

It seems too clear for argument that if the defendant in execution, having given a forthcoming or delivery bond, or the lessee, having given a release bond, may validly sell the property, that he might also pledge it, or subject it to the right of pledge by removing it into premises leased from another lessor; and this does not depend upon the form of the bond. It results from the effect of the bond, from the release of the seizure, and the resumption by the owner of his power and dominion over that which is his, and which is in his possession. It follows that when Patzelt's property, provisionally seized by Conrad, was released on bond, and was placed in the premises leased to Patzelt by Jackson, that

Jackson's right of pledge attached to it; and after the expiration of fifteen days Conrad's right of pledge was barred, lost by prescription, and he was remitted to the security afforded him by the bond.

Blanchin vs. Fashion, 10 An. 49, and Harrison vs. Jenks, 23 An. 707, have been cited as establishing a contrary doctrine as to the effect of the release on bond of property provisionally seized. It will be seen that our courts do not follow the rule in the Admiralty that the release bond, in a seizure *in rem*, extinguishes the lien under which the seizure was made. The difference is that the release, on bond, of property provisionally seized, restores it to the condition in which it was at the time the seizure was made, subject to the lien or privilege under which the seizure was made, and to all other liens which existed at that time, just as if no such seizure had been made; and this is precisely what was decided in Blanchin's case, and in Harrison vs. Jenks.

Blanchin brought suit against the steamboat Fashion and owners, and caused the boat to be provisionally seized. The boat remained in the custody of the sheriff for one day, and the seizure was set aside on a bond conditioned exactly as the bond is in this case. At that time privileges against steamboats were prescribed by the lapse of sixty days. Blanchin's account began in January, and on the tenth of March he recovered judgment for the whole amount, and on the twenty-third of March the boat was seized by the sheriff under *feri facias* issued on that judgment. The proceeds of sale under this writ were brought into court for distribution, and Blanchin claimed the whole amount of his debt, with privilege. The court said the release of the boat on bond did not extinguish the privilege for which the seizure was made; it simply left that privilege in the exact condition in which it was at the time the release bond was given. During the one day that the boat was in actual custody the prescription of sixty days ceased to run. The release on bond took the boat out of legal custody; and the prescription began to run again immediately so far as other creditors were concerned. The prescription was arrested by the seizure on the twenty-third of March, but, in the *concurso*, all the items in Blanchin's account prior to sixty-one days before the twenty-third of March were prescribed and ceased to operate as a privilege. The seizure did not create the privilege, nor did the release on bond extinguish it. It was extinguished by the lapse of time. The prescription was suspended while the boat was in the custody of the law; it began to run again the moment the law relinquished its hold on the property.

In Harrison vs. Jenks, 23 An. 707, the plaintiff seized provisionally for rent, and the seizure was set aside on bond. The defendant remained in the same premises, the house let to him by Mrs. Harrison, and the property was not removed, but remained in the same premises as before the seizure.

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The persons who had sold the furniture to Jenks sequestered it a few days before the seizure by Mrs. Harrison; and they maintained that Mrs. Harrison's right as lessor was extinguished by the release bond. The court held that a privilege which does not depend upon the seizure is not extinguished by the release of that seizure. When the seizure was released the property remained just as it was before, in Mrs. Harrison's house, subject to Mrs. Harrison's right of pledge. That is, the release restored the property to the exact condition in which it was at the time the seizure was made.

Conrad seized for rent, and the seizure was set aside on bond. At the time this seizure was made part of the property subject to Conrad's right of pledge had been removed out of the premises. Availing himself of the right given to the lessor by the Civil Code, Conrad followed the property and seized it within the fifteen days. When the seizure was set aside, on the thirteenth of March, Conrad's right of pledge was not extinguished; and if the property had remained in his house, his right of pledge would have continued just as in Harrison vs. Jenks. But that which the release on bond did not do was fully accomplished by the removal of the entire property out of the premises of Conrad into the store and premises of Jackson, and by the lapse of fifteen days after that removal; and Conrad's right of pledge, which existed for fifteen days, and for fifteen days only, after the removal, was extinguished, no longer existed at the expiration of the term.

It has been suggested that when Conrad seized under the *feri facias*, Jackson should have seized also, and that his failure to do so gave Conrad a right of preference. But this proposition is wholly untenable. In Sheldon vs. Canal Bank, 11 Rob. 181, it was held that the mere seizure by the sheriff does not divest the debtor of his property. In this case the sheriff did not remove the property; it continued on the same premises, and still belonged to the lessee, and Jackson intervened and asserted his right before the sale.

In Robinson vs. Staples, 5 An. 712, the plaintiffs seized under *feri facias*. The lessors of the debtor, Staples, took a rule on Robinson, plaintiff, to show cause why the proceeds of the sale about to be made "to the amount of the entire rent due and to become due," should not be paid to them as privileged creditors; and the court of first instance maintained this right and claim of the lessors.

Judge Slidell, delivering the opinion of this court, affirming the judgment in favor of the lessors, said: "It is not well argued by plaintiff's counsel that the lessors can not have their privilege in this case because they did not make a provisional seizure under the statute. THE PROCEEDING WAS UNNECESSARY, THE PROPERTY BEING ALREADY *in custodiam legis*."

In Harmon vs. Juge, 6 An. 768, two attachments were levied on a stock

of goods, and they were afterward sold under *feri facias* on the judgment, with privilege, in favor of the attaching creditors. Harmon, the lessor, after the sale, before the delivery of the goods, took a rule on the seizing creditors to show cause why the rent due him should not be paid out of the proceeds in the hands of the sheriff; and the judgment of the court below, in his favor, was affirmed by this court.

In *Vaught vs. the City*, 12 An. 339, the property of defendant was seized under *feri facias*. Some twenty-five days after this seizure, before the sale, McLin intervened, and claimed the lessor's right of pledge on the movables. The court held that this was proper proceeding, by intervention and third opposition, without seizure of the effects already under seizure, and that the lessor was entitled to be paid the full amount of his rent out of the proceeds of the sale under *feri facias*. The court said: "When McLin asserted his privilege it is clear that the defendant in execution had not been divested of his title to the property thus seized, and that the property had not been removed from the leased premises."

In *Case vs. Kloppenburg*, 27 An. 482, it was held that the lessor could not prevent the sale, under *feri facias*, at the suit of an ordinary creditor, of the effects of the lessee found on the leased premises; and that he must intervene and assert his right to the proceeds contradictorily with the seizing creditor.

But it is said the condition of the release bond has been complied with by the surrender of the property, and by the sale by the sheriff, so that the bond is not available as security to Conrad. It would be premature and improper for us to express any opinion now as to the effect of the release bond, so far as the surety is concerned. The plain answer to the objection is that there is no stipulation in the bond for the surrender or the return of the property. But, if it had been a forthcoming bond, the property, after the release of the provisional seizure, had become subject to Jackson's right of pledge; it was in Jackson's house, constructively in Jackson's possession, and by timely and proper proceeding, he asserted his right before the sale, as in *Robinson's case*, 5 An.; *Harmon's case*, 6 An.; and *McLin's case*, 12 An., and, as in these cases, the property was not removed from the leased premises in which it was found until after the sale by the sheriff. Patzelt could not have surrendered it, nor could he have removed it, nor could he have authorized the sheriff to seize it, nor could it have been sold at the instance of any ordinary creditor, except in subordination to Jackson's superior right of pledge.

It is urged that this interpretation of the law will defeat the right of the lessor, and will make the provisional seizure the means of extinguishing his pledge. The answer is, the lessor may lock the doors and prevent the removal of the effects until the rent is paid, but if he should be

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compelled, or should choose to resort to provisional seizure, the same law which gives him that right gives the lessee the right to have the seizure set aside on bond. The law requires a good and sufficient bond. It is the lessor's right to have such a bond; and in this case Conrad appeared, and, at his instance, the court increased the bond to an amount exceeding by one half the debt sued for.

The judgment of the court below discriminates between these lessors; and it gives the preference to the one from whose premises the property had been removed more than nine months before the sale, while it denies any right of pledge whatever to the lessor on whose premises the property had been for more than nine months, and on whose premises it was found and was seized and sold.

It must be remembered that if Conrad is a favored creditor, Jackson is an equally favored creditor; that Conrad's right of pledge was extinguished by the lapse of time after the removal of the property from his premises; that Conrad had the security of a bond, the sufficiency of which as to the amount and solvency of the surety has not been questioned, while Jackson has no other security than that afforded him by the proceeds of the property on which he had the right of pledge at the time it was seized and sold under the *feri facias*; that Jackson has done nothing by which the right given him by the express terms of the law has been impaired; and if it is a hardship for Conrad to be remitted to an action on the bond, which is simply the effect of the law which he invoked, it would be a much greater hardship for Jackson to be deprived of the only security which the law affords him and to lose his entire rent.

But the controversy is not to be determined by any argument *ab inconvenienti*. Its proper solution depends upon the law; and that law which authorizes the lessee to have the provisional seizure set aside on bond necessarily remits the lessor to the security afforded him by that bond if the lessee should remove the property, or incumber it, or subject it to the right of pledge in favor of a new lessor, or so deal with it that it could not be reached and made available under the ordinary process of *feri facias*; and such is the category in which this property was placed by the removal into the store leased from Jackson.

The judgment appealed from is clearly erroneous in so far as it gives priority to the claims of Conrad. Since the judgment was rendered all the rent notes of Patzelt, held by Jackson have matured, and it is proper that the judgment should be amended in that respect.

It is therefore ordered, adjudged, and decreed that the judgment appealed from in so far as it dismisses the reconventional demand of Joseph Patzelt be affirmed; that the said judgment in so far as it is in favor of James Jackson and against Joseph Patzelt be amended as here-

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inafter set forth; and that in all other respects the said judgment appealed from be avoided and reversed. And it is further ordered that the intervention and third opposition of James Jackson be maintained; and accordingly that the said James Jackson do have and recover of and from Joseph Patzelt the sum of eighteen hundred dollars (\$1800), with interest at the rate of eight *per cent per annum* on the sum of one hundred and fifty dollars (\$150) from the fifteenth day of October, 1875, and like interest on the like sum from the fifteenth day of each and every succeeding month up to and including the fifteenth day of September, 1876, until paid, and that the same be paid first and by priority and preference over the claim of Charles A. Conrad, out of the proceeds of the property and effects seized on the premises No. 57 Camp street, leased by James Jackson to Joseph Patzelt, sold by the civil sheriff of the parish of Orleans under the writ of *feri facias* issued upon the judgment in favor of Charles A. Conrad against Joseph Patzelt, No. 6408 of the docket of the Fifth District Court for the parish of Orleans; and it is further ordered, adjudged, and decreed that the costs of the intervention and third opposition of James Jackson in the court below and the costs of this appeal be paid by the said Charles A. Conrad.

CONCURRING OPINION.

EGAN, J. The lessor has for the payment of his rent and other obligations of the lease a right of pledge on the movable effects of the lessee which are found on the property leased. C. C. 2705. This gives the lessor a preference right of payment out of the proceeds of such movable effects and also the right to take the effects themselves and retain them till he is paid. C. C. 3218. While he has this right to retain the thing itself, he also has a preference right of payment out of its proceeds which entitles him to be preferred before other creditors owing to the nature of his debt. This comes fully within the definition of privilege given in the law. C. C. 3186. The lessor's privilege is classed in the Code among the debts which are privileged upon certain movables. C. C. 3216. And again: "The privilege of the lessor is enforced on the property subject to it in the manner described in the title of lease." C. C. 3219. In the Code of Practice it is spoken of as a "lien," which in common intendment answers to the definition of privilege given in the Code. The lessor's rights are treated of under the head of privileges in the Civil Code, and the order of payment with reference to the other creditors and privileges regulated under that head, C. C. 3258 and 3259, and while he has under the law *more* than a privilege, a right of pledge, he has no less than a privilege as defined in the law and as frequently

held by the courts. It is in general essential to the contract of pledge that the creditor be put in possession of the thing given to him in pledge; that actual delivery of it be made to him. C. C. 3152. By a fiction of the law the possession of the lessee on the premises of the lessor is considered for the purposes of this peculiar pledge that of the lessor. It is *this right of pledge only* which is treated of under the title of "Lease" in the Civil Code. "In the exercise of this right the lessor may seize the objects which are subject to it before the lessee takes them away, or *within fifteen days after* they are taken away, if they continue to be the property of the lessee and can be identified." C. C. 2709. He may seize, *even in the hands of a third person*, such furniture as was in the house leased if the same has been removed by the lessee, *provided he declare on oath that the same has been removed without his consent within fifteen days previous to his suit being brought*. C. P., art. 288. It will be perceived from these provisions of the law that this extraordinary right given to the lessor *can only be exercised* while the property subject to it *is on the leased premises*, or *within fifteen days after removal*, and not even within that time if the lessee has sold the property. This right is "*stricti juris*," and can not be extended to other conditions or for a longer time. It is absolutely at an end after the lapse of fifteen days from the removal of the property. It is *this right* which our predecessors held to exist independent of registry. This is the only view in which these decisions can be reconciled with article 123 of the constitution of Louisiana, which abolishes tacit mortgages and privileges, and provides that "no mortgage or privilege shall hereafter affect third parties unless recorded in the parish where the property to be affected is situated," and with the statutes passed in pursuance of that article. See Civil Code, 3273 and 3274, to the same effect.

This article of the constitution, in my opinion, declares a new policy, the want of which had long been felt in this State, a policy which the courts should not and can not contravene, and which requires registry of all *privileges*, without distinction or exception, in order that they may affect third persons. It is asked how can it be known what property is subject to a recorded lessor's privilege; how can it be identified? To this it may be answered, that the same difficulties exist in regard to the privilege of the laborer, the overseer, the furnisher of supplies, and many other privileges, the necessity and effect of the registry of which is daily recognized by the courts and required by law. The plaintiff in the case at bar has not preserved his *privilege* against third persons by such registry, and his right must yield to that of the second lessor, the third opponent, in whose premises the property was seized under the *feri facias*, unless it is preserved by his provisional seizure, issued within *fifteen days after* its removal from his premises. Had he thought proper,

he could have retained the effects of the lessee, under article 3218 of the Civil Code, until he could have obtained a decree of court for their sale without resort to a provisional seizure, the effect of which was to take them out of his custody into that of the law, to place them "*in custodiam legis*," and to give the defendant the right to resume possession by executing bond. Of course it must be assumed that plaintiff contemplated this, for such was the law, of which the defendant availed himself by giving the required bond, and continuing his business as merchant in the house of the third opponent until the seizure under *feri facias*, which gave rise to the present litigation, and which took place some months after that under the provisional seizure. Now it has been often held that a provisional seizure, a mere conservatory writ, like a sequestration, gives no privilege: That springs only from the law and the nature of the debt. Neither does the dissolution of the writ and the release of the property on bond *destroy the privilege*. See *steamer Fashion's case*, 10 An. 49. This is not a question of "*destruction*" of privilege, but of its *preservation* or not as against third persons.

The only cases in which the pendency of suit operates notice to the world, so that no adverse right can be acquired, are suits for property; for some specific thing, which is the subject of the litigation, or when it is in legal custody.

In England, but never in this State, it has been held to apply to a mere suit to enforce a mortgage, but there a mortgage vests in the mortgagee the legal title, while the equity of redemption alone remains in the mortgageor. With us a mortgage is a mere security, a mere incumbrance upon the property, while the legal title still remains in the mortgageor, and our courts have never extended to them the doctrine of notice from the pendency of suit, which does not even prevent the mortgage perempting, unless reinscribed. In my opinion, and under the authority of the repeated decisions of this court "*in consimili casu*," no intervention would have been entertained in this case from the moment the property was released on bond. From that moment it was no longer "*in custodiam legis*," and any claimant must have pursued it where he found it. From that moment the bond stood in the place of the property to secure the rights of the plaintiff and to answer his judgment, unless relieved by its voluntary restoration. Any other view would be at war with the policy which favors the right of alienation, and is especially of the class of property seized in this case; and under any other view the giving of bond for the release of the property would be motiveless, and wholly without advantage to the defendant. The plaintiff has the security of the bond of release, given in this case—to which the third opponent can not look for his protection—and might well be held to look to his bond under the equitable doctrine invoked by the counsel for the third oppo-

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nent. But under the views before expressed, the plaintiff's right of pledge had expired by the lapse of more than fifteen days from the removal of the property before the seizure under *feri facias*. His right of privilege was lost, as to third persons, for want of registry, and his right derived from the seizure under *feri facias* must yield to the superior right of the third opponent, in whose premises the property was found by the sheriff, and who resorted to the mode pointed out by law to protect and assert that right.

It is said, however, that he had not recorded his lease, and is in no better position than plaintiff. This might be true, had he not opposed the plaintiff's seizure while the property was still on the premises, and affected by all his rights as lessor, subject to which the plaintiff had a right to seize and sell the property of his judgment debtor. By the third opponent interposing the shield of the law directly in the path of the plaintiff who *quoad* this proceeding is a *party* and not a *third* person the plaintiff necessarily occupies as to the third opponent and his rights a very different position from that occupied by the third opponent as to the original suit and provisional seizure of plaintiff, to which he was no party. Two articles of the Code of Practice authorize release bonds in cases of provisional seizure. The first, 287, applies solely to rent seizures, the second, 289, applies to all provisional seizures. This has been sufficiently discussed, and whatever might be the effect of the bond given under article 287, it is only necessary for me to say that both the plaintiff and defendant evidently treated the bond in this case as given under article 289, and for an amount fixed by the judge, which was neither that of the claim with interest and costs, nor equal to the value of the property ascertained in the manner provided in article 287, i. e., by the sheriff, with the assistance of two appraisers. To argue, then, that article 287 alone authorizes release bonds under provisional seizures for rent, is to argue that plaintiff, upon whose rule and contradictorily with whom the bond in this case was given, has no *judicial* bond for his protection. I do not, however, subscribe to this view. The bond was given and taken under order of court, is to be interpreted by the law as to its obligations, and the plaintiff is entitled to its benefits which it is presumed are ample for his protection, as it was taken for an increased amount on his application, and he accepted the surety by not objecting to him as insufficient.

I concur in most of the reasoning and in the decree in this case.

DISSENTING OPINION.

DEBLANC, J. On the eleventh of March, 1875, Charles A. Conrad brought suit against Joseph Patzelt, for \$960, alleged to be due him for the lease of a store on Camp street, in the city of New Orleans.

On the same day, the eleventh of March, 1875, having been informed that defendant had partly removed and was then engaged in removing to another store the furniture and effects subject to his rights as a lessor, plaintiff immediately applied for and obtained the provisional seizure of said furniture and effects, the most of which was yet in his (Conrad's) store.

The provisional seizure thus made was released, first on a bond which was declared insufficient in amount, afterward on a bond the amount of which was fixed by the lower court. From that date the property seized was transferred to and remained in defendant's possession until the third of January, 1876.

Conrad obtained judgment against Patzelt, and, under a writ of *fiat facias*, issued out of said judgment, the property which had been provisionally seized and released on bond was again seized, advertised for sale, and sold on the third of January, 1876, for \$1276 40, and, on the thirtieth of December, 1875, four days before the sale hereinbefore mentioned, and more than nine months after the provisional seizure by Conrad, James Jackson filed a third opposition, in which he prays for judgment against Patzelt for four hundred and fifty dollars, which he alleged was then due him, and for the additional sum of thirteen hundred and fifty dollars to become thereafter due. In that opposition he claims to be paid by preference to Conrad out of the proceeds of the sale of the property which had been seized and advertised for sale to satisfy the latter's judgment.

On the third of April, 1876, Patzelt filed an exception, in which he contends that, as to a part of his claim, Jackson's action was premature. His exception was not discussed and passed upon, and judgment was rendered against him in favor of Jackson, not merely for the rent due at the date of the institution of the latter's suit, but also for the amount of the notes which matured since the suit and since the rendition of the judgment.

The evidence establishes that on the day of the trial of Jackson's intervention, the twentieth of March, 1876, Patzelt was owing him for the rent of the store only six out of the eleven notes sued upon, and the judgment should have been for exclusively the amount of the matured notes, nine hundred dollars, with interest, as thereon stipulated.

Article 287 of the Code of Practice provides that, "when a lessor sues for rent, whether due or not due, he may obtain the provisional seizure of the property subject to his pledge." This means that, under specified circumstances, the lessor may proceed to provisionally seize for rent due and to become due, but does not authorize a final judgment on an obligation, the consideration of which has not accrued and may never accrue.

It may be that Patzelt has retained possession of the premises leased

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from Jackson until the expiration of the lease, on the fifteenth of September, 1876, and that he is bound for every one of the notes furnished to said Jackson, and which matured after the date of said judgment, but, so far as those notes are concerned, we can only reserve to both parties their rights of action and defense on and against the same. C. P. 158; 22 An. 50.

The questions which now remain to be examined are:

First—Was Conrad's pledge, on the property provisionally seized by him, released by the effect of the forthcoming bond furnished by Patzelt?

Second—Was Conrad bound to sue on exclusively that bond to enforce his rental claim?

First—Under our Code, the lessor has more than a privilege on the lessee's movables found in the house let. He has the absolute right, without writ or process, to take and retain those movables until he is paid. R. C. C. 3218. In the exercise of that right he may seize the lessee's effects before they are taken away, or within fifteen days after their removal. He may then seize, according to the Code of Practice, even in the hands of third persons, and, according to the Civil Code, he can seize after the removal, only when the removed effects continue to be the property of the lessee and can be identified. C. P. 288; R. C. C. 2709.

The apparent conflict between these articles of our Codes has been correctly explained. In the sixteenth Annual, page 351, this court held that the term "third person" in the 288th article of the Code of Practice applies to depositaries, bailees, pledgees, and all other persons, except purchasers.

Why is the provisional seizure allowed to the lessor? In the clear and positive language of the law, it is allowed *that the lessor may not be deprived of his pledge*. Is it not evident, then, that the sole object of the provisional seizure is to preserve and not to destroy the lessor's right; is it not as evident that the sole effect of the forthcoming bond is to release but the provisional seizure? Adopt any other construction, and what would be the result? The evidence of one of the highest rights granted by the law, protected and enforced by every court, would invariably destroy the pledge which secures that right, and the once favored creditor would invariably be left with an action on the bond. That construction is repugnant to the intent and to the very letter of the law.

The lessee has an absolute right to give bond and release the seizure; he can do so without the consent and against the will of the lessor, but that bond can not, does not, lessen, impair, or destroy the pre-existing pledge, that pledge which springs, not from the seizure, but from the law. As soon as the bond furnished by the lessee is accepted, the seizure falls, but the right of pledge preceded, and it survives the seizure. 22 An. 210; 23 An. 707.

The lessor's right is not granted by any article to be found in the chapter of the Civil Code which treats of privileges. There it is classed, not as a privilege, but among the claims to be paid by preference; there we read that enactment, pregnant with but one signification, that the lessor's right is of a higher nature than a mere privilege. The right itself is granted by the 2705th article of said Code; it is called a pledge, and, as a pawn, that pledge invests the creditor with the right of causing his debt to be satisfied by privilege and in preference to the other creditors of the debtor out of the proceeds of the movables on which it bears. R. C. C. 3157.

Let us assume, in disregard of the law, that the lessor's right is but a privilege, and that, as Conrad's lease was not recorded, it remains without effect as to third persons. Would that strained construction avail or benefit Jackson? Has he been more vigilant than Conrad? Is he claiming under a recorded lease? The first and last seizure by Conrad were made before he had any legal notice, by registry or otherwise, of the existence of a lease between Jackson and Patzelt, and, under the assumed construction, the privilege resulting from Conrad's last seizure would outrank that of opponent.

It may be urged that, as the lessee's possession is that of the lessor from the time the furniture and effects went into Jackson's store, they were held by Patzelt for Jackson. If we divide that proposition, it is a true, a correct one. When one leases his house or his farm, the lessee's possession of that house and that farm, the title to which is in the lessor, is, can, and should be but the lessor's possession; but, applied to the lessee's possession of his own effects and furniture, that proposition is unfounded in fact, untenable in law, as then the lessor's right is on and not in and to the property.

So far as relates to the property which had been provisionally seized by Conrad, was ever Jackson a pledgee? Has he at any time had either a real or constructive possession of that property? Was it delivered to him as a lessor, to Patzelt as the owner, and free from incumbrance? It was merely left in the latter's possession as a keeper, with Conrad's right resting on it, unchanged, unimpaired, indestructible.

The lessor's pledge, as the pawn, secures a debt; but the first secures but one claim, that of the lessor, the other secures any claim, whatever may be its nature. Those pledges are alike in some respects, different in others. That of the lessor leaves the thing in the lessee's possession; the other does not and can not exist without actual delivery to and possession by the creditor. To have effect against third persons, the act which evidences a pawn must be recorded; the lessor's pledge, without being recorded, preserves its effects against all. 23 An. 453; 24 An. 143; 2 An. 14.

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In his "Contrat de Louage" Pothier says: "Si le locataire d'une maison à l'insu du locateur envers qui il est redevable du loyer et autres obligations de son bail, a transporté ses effets dans une autre maison qu'il a prise à loyer, le premier locateur a droit de les suivre dans cette maison, et doit être préféré au nouveau locateur, et non pas venir en concurrence avec lui."

The lessor's is an extraordinary, an exceptional pledge. It bears on the effects which are on the leased premises at the commencement, and those which are found there at the expiration of the lease. It so bears when the effects have been removed, during fifteen days from the removal, and if within that delay they are provisionally seized by the lessor, his pledge remains attached to them as long as they are not sold, in whose-soever hands they may pass, and until his claim is discharged. Otherwise the provisional seizure, though intended to preserve that pledge, would leave it in the power of every lessee to defeat and destroy it.

Were we to consider the lessor's pledge as the most ordinary one, is not the pledgee protected by law against the removal of the things which secure his right? Is not that removal a fraud, an unlawful act, denounced by the Code, and in express terms, as a sort of theft? Can that fraud, that violation of a contract and of the law, blot out an existing right and confer on any one, after the lessor's seizure, an adverse right? I believe not. C. C. 3173; 2 An. 14; 16 An. 351.

When he furnishes his release bond, the lessee becomes the keeper of the property released; he holds it for the sheriff, who held it for the lessor, and no adverse possession, except of a *bona fide* vendee, can intervene or be acquired thereon. That keeper's obligation is to retain, preserve, and return the property. He might part with it, but not legally. His lessor, and, beyond a doubt, the sureties on his bond, could prevent any disposal of the released property to their detriment. Patzelt and Jackson so understood, for every article of furniture, every effect which had been provisionally seized, remained in the former's possession, in the latter's store, until, under Conrad's judgment, they were identified, levied upon, and sold.

The lessee, whose effects have been provisionally seized, can have the seizure released by executing, not at his choice, one of two distinct bonds, but only one bond, a forthcoming bond, which, and this at his choice, may be for an amount equal to the value of the property to be left in his possession, or equal to the amount of the lessor's claim.

What is the paramount obligation of the principal and sureties on a forthcoming bond? The name alone indicates the character of that obligation. Which ever of the aforesaid conditions they may adopt, the principal and his sureties bind themselves to return the released property; that is their first, their paramount obligation. If they fail to return

it, they are bound to account for its value; that is their secondary obligation.

The bond furnished by Patzelt does not correspond in form to that referred to in the articles of the Code of Practice. He and his sureties merely bound themselves to pay any judgment that may be rendered in favor of Conrad; the condition, "*or return the property*" was omitted, but that omission does not relieve them from the effect of a legal obligation, one which must be construed with reference to the law under which it was given.

Taken and considered alone, the law of 1868, now embodied in the 287th article of the Code of Practice, is vague and incomplete. It merely provides that a forthcoming bond may be executed, but not to whom it is to be made payable, nor under what circumstances it would be forfeited. These unexpressed conditions we find in article 289 of the same Code: "When vessels or other property provisionally seized are released on bond, the condition of that bond is that defendant shall satisfy such judgment as may be rendered against him, or return the property." In this case the judgment rendered in favor of Conrad has not been satisfied, the bonded property has been returned and sold to satisfy said judgment. Under what principle of either justice or equity could the sureties on that bond be now held liable?

Second—The lessor is not restricted by law, and he can not be justly restricted by the court, to a suit on exclusively the forthcoming bond. He can not be compelled to thus abandon a reality for a chance, to exchange pledged property, or the proceeds of that property, for an action on one of those obligations, the payment of which is always resisted, always delayed, to renounce an acquired priority, a right of preference, for additional trouble, additional litigation.

The third opponent tells Conrad, the first lessor, "leave me the funds realized by the sale made under your writ and sue on the bond." To that proposition of the second lessor Conrad answers: "That bond is no longer in existence; those who furnished it, principal and sureties, have complied with its conditions and their obligations; they have returned the released property and that property has been sold. By that return and that sale the bond is now a lifeless obligation, which can be enforced by nor against any of the parties."

We unhesitatingly acknowledge the justice of the doctrine invoked by opponent's counsel, that when two funds of a common debtor are available to one of his creditors, and a single one of these funds to another, the former will be restrained from exhausting the fund which is the only resource of the latter; but that doctrine does not apply to this case, as here there is but one fund to be distributed, and the creditor with a pledge can not be condemned to renounce that only fund for an already satisfied bond, an extinguished obligation.

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At what date did Jackson's pledge as a lessor attach, if it ever did, to Patzelt's furniture and effects? On the fifteenth of March, 1875, four days after Conrad's provisional seizure, a seizure partly executed in Jackson's store. He was then, by that seizure, notified of the existence, nature, and extent of Conrad's claim, and leased at his peril.

It is apprehended that our construction of the law, as to the lessor's pledge, is calculated to take by surprise and deceive second and subsequent lessors. For how long, if at all? At most fifteen days, in cases of fraudulent removals—never, when the first lessor has proceeded against the lessee. During that very short and very reasonable delay, and no longer, under the specified circumstances, and none else, imprudent lessors may be exposed to the effects of a previous right, acquired under a previous contract.

When we compare to the unimportant and trifling loss of a rent of fifteen days the serious and important loss which may befall the first lessor, we can but consider that not only the imperative letter of the law, but the interest of all lessors, command the discouragement of any violation of a previous lease.

As to Jackson, he would in vain attempt to prove that he was taken by surprise; he was more effectually informed by the suit and the seizure of Conrad of the extent and nature of the latter's right than he would have been by any recordation of the lease. In 8 An. p. 252, the court said:

"It is rule of universal jurisprudence, and one which has been expressly recognized in our Code, that every man is presumed to be attentive to what passes in the courts of the State where he resides or has transactions. A purchase therefore, of an estate, *pendente lite*, even for a valuable consideration, and without any express or implied notice in point of fact, affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the decree rendered in the suit."

In the case of the Bishop of Winchester, referred to in the same book, the question being whether subsequent mortgagees were bound by the decree of foreclosure, though not made parties, their rights having been acquired *pendente lite*, Sir William Grant held that—

"Ordinarily the decree of the court binds only the parties to the suit; but he who purchases during the pendency of the suit is bound by the decree which may be rendered against the person from whom he derives title. The litigating parties are exempted from the necessity of taking any notice of a title so acquired, and a mortgage, and, of course, a privilege taken or acquired *pendente lite*, can not be exempted from the operation of that rule."

In the case of Long vs. French, Justice Eustis said: "The defendant,

after the institution of this suit, made a sale of the property in litigation, and has urged this fact as a matter of defense. This is subversive of the first principles of justice, and only receives our notice for the purpose of expressing, as we feel ourselves bound to do, our reprobation of it. This act, on the part of defendant, shows a settled determination to sport with a contract, and to defeat, at all hazards, every effort which his adversary may make to obtain his just rights from the tribunals of his country. It is to be regretted that parties will not understand that in conduct like this they can receive neither aid nor countenance from a court of justice. 13 La. R. p. 259.

In the case of Gillespie et al. vs. Cammack et al. Mr. Justice Slidell said: "The principle which defeats conveyances made *pendente lite* applies *a fortiori* to incumbrances." 3 An. 252.

In the case of Taylor vs. Pipes, reported in 24 An. 557, Chief Justice Ludeling, in his dissenting opinion, said: "If Taylor, the purchaser of mortgaged property, be entitled to notice as a third possessor, his vendee, in case he should sell *pendente lite*, would also be entitled to the same notice, and plaintiff would discover that he had a legal right without a practical or real remedy." In support of his opinion, the judge referred to 4 La. p. 558; Story on Equity, vol. 1, p. 394; 1 John. Ch. R. 576.

How can a rule of universal jurisprudence be divided and subdivided, be made to apply to a whole and not to a fraction of that whole, to the principal and not to the accessory, to a right in and not to a right on the property? Can one incumber to the detriment of an acquired right that which he is expressly forbidden to sell to its detriment? If one sells *pendente lite*, and judgment be rendered in favor of his opponent, his sale is to be considered as that of another's property, and is no obstacle to the execution of the judgment. Can a presumed pledge on the property carry a different, a more extended right, than an absolute transfer?

If judicial process is so insignificant a notice that, though enforced in your store, in your presence, it does not even suggest the existence of a right, then, with the assistance of a few friends, litigation, by timely and successive transfers and incumbrances, might easily be transmitted from one generation to another.

In my opinion, Conrad's process left on the articles provisionally seized a brand which no one should be allowed to disregard—that of the law, a notice which no one should pretend to ignore, that of his pledge. The law would be an unfaithful sentinel if, while a right is placed under its immediate guard, it opens the door to another, a subsequent, an opposite right, one born only after the execution of the process which secured and protects the first; still more, the law would be a treacherous sentinel, if it not only opens the door to the posthumous right, but actually assists in the destruction of that confided to its guard.

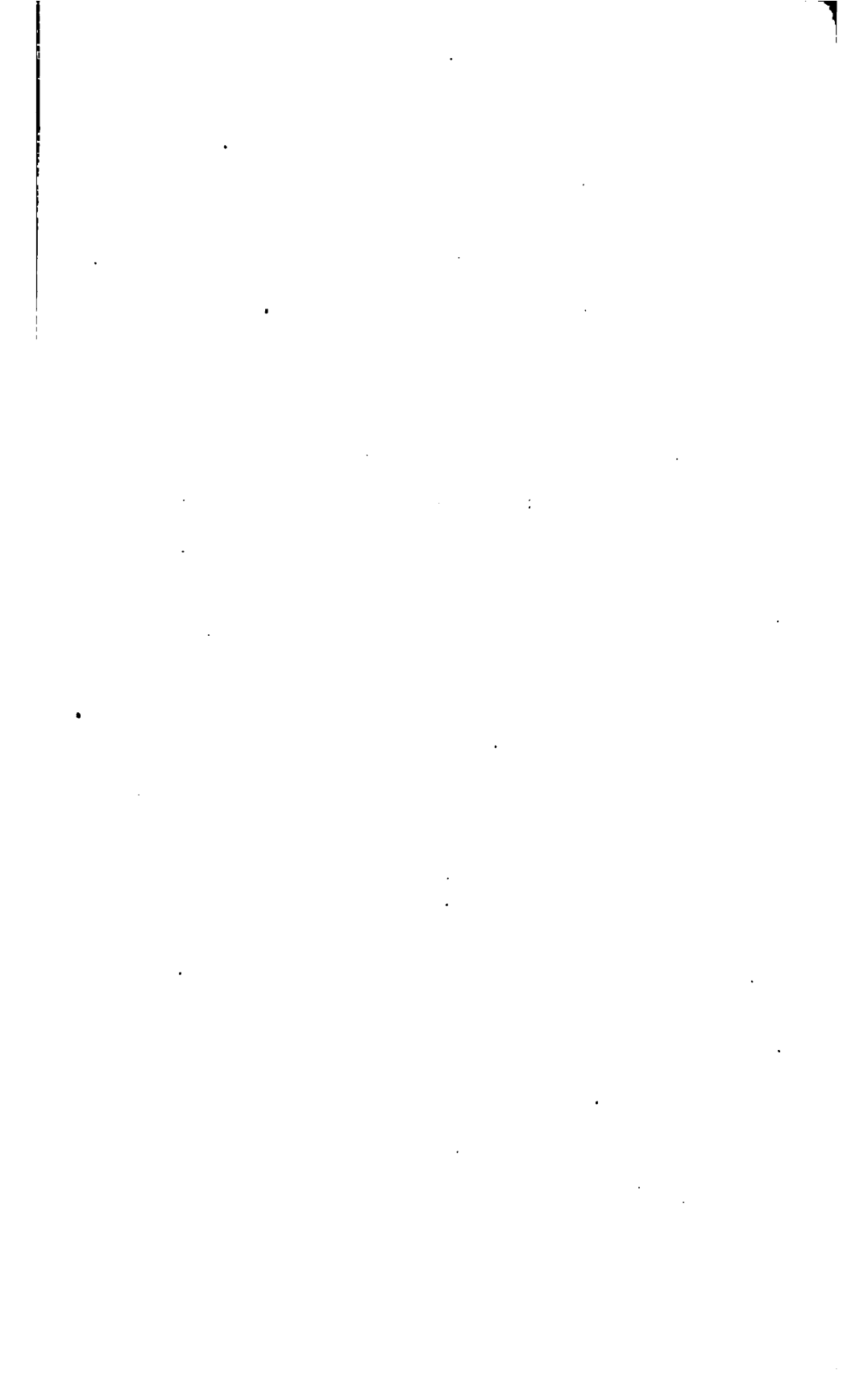
Conrad vs. Patzelt.

The act of lease relied upon by Jackson, and his own declaration in court, fully establish that said lease commenced on the fifteenth of March, 1875. It was only from that date that he could have acquired any rights on Patzelt's effects, and, at that date, Conrad had already claimed and partly executed the very same right against the same lessee. It can not be that, despite his diligent course, his strict compliance with the law, he has forfeited and lost the indisputable rank of his acknowledged claim.

I consider, however, that the judgment of the lower court should be amended in so far as it allows against Patzelt the whole of Jackson's claim, instead of the amount due him at the institution of his suit, and in so far, also, as it dismisses Jackson's opposition. The property subject to the two lessors' pledge was sold for more than the amount of Conrad's claim, and any balance that may remain after the satisfaction of said claim should be applied to Jackson's judgment.

For the reasons stated, I can not concur in the opinion of my associates.

SPENCER, J. I concur in the opinion delivered by Justice De Blanc.



CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

AT

OPELOUSAS.

JUNE, 1877.

JUDGES OF THE COURT:

HON. T. C. MANNING,	<i>Chief Justice.</i>
HON. R. H. MARR,	
HON. A. DeBLANC,	
HON. W. B. SPENCER,	
HON. W. B. EGAN,	

} *Associate Justices.*

No. 990.

SUCCESSION OF RAPHAEL ROMERO. ON OPPOSITION TO ACCOUNT.

29	493
51	1673
29	493
109	288

The acknowledgment of a succession debt by the administrator, interrupts its prescription.

A debt of a succession, once acknowledged by the administrator, whether the debt be in the form of a note, or open account, if prescriptible thereafter, is only prescribed in *ten* years.

A PPEAL from the Parish Court, parish of St. Martin. *Fournet, J.*

L. J. Gary, Edward Simon, and DeBlanc B. Fournet, for appellant.

F. & M. Voorhies and Mouton & Martin, for opponent.

The opinion of the court was delivered by

MANNING, C. J. The succession of Raphael Romero was opened in 1865, and was administered by Cleophas Romero until his own death. In 1869 Numa Babin was appointed administrator, and filed an account some years afterward, which was opposed by the heirs and by some of the creditors. The plea of prescription of five years is opposed by them to several claims, admitted by the former administrator to be just, and placed by the present administrator upon his tableau of distribution.

Succession of Romero.

The claim of Lafitte, Duffho & Co. is one of them thus opposed. These creditors had instituted suit against the first administrator and obtained judgment upon their note. The plea is based upon an allegation that the citation which preceded the judgment was so defective that the judgment was a nullity, but these defects are not pointed out. The objection was frivolous, and was so held by the lower court.

The same disposition was made of other oppositions, but some of them were maintained, and it is only necessary for us to review the judgment as to them.

Sylvestre Romero holds a note of the deceased for thirteen hundred dollars and interest, payable on demand, and dated twenty-third of February, 1861. He presented this note to Cleophas, the first administrator, on the twentieth of January, 1866, for recognition, and he wrote on the back of it the following:

"I acknowledge that this note is due, less the amount on the back. I will pay it in the course of my administration of the succession of Raphael Romero. Dated twenty-sixth of January, 1866.

"CLEOPHAS ROMERO, Administrator."

On the twelfth of April, 1870, Babin paid Sylvestre Romero two hundred dollars out of the succession funds, in part of this note.

On the tenth of March, 1875, the administrator filed his tableau of distribution, and placed thereon this note as an acknowledged and recognized debt of the succession.

The administrator receipted to his attorney on the seventeenth of April, 1876, for a payment made on this note, and, notwithstanding this continuous recognition, and, we presume out of abundant caution, suit had been instituted on the note and citation served on the administrator on the thirtieth of January, 1871.

It is difficult to comprehend how a plea of prescription can be successfully opposed to this note.

Our law for the settlement of successions does not contemplate or encourage suits against them except when the representative of the succession refuses to recognize the claims. All persons holding claims against deceased persons are required to present them to their representatives, and if they shall recognize the claim as valid and just, and write on the back of it, or on an annexed paper, a statement to that effect, the holder of the claim is not expected to bring a suit upon it, and if he does, the succession is not chargeable with the costs. It is evident that the judge of the court *a qua* applied the prescription of five years in his judgment sustaining the opposition, and this is an error. Before the prescription applicable to notes (*i. e.* five years) had accrued the holder of the note had obtained the written acknowledgment of the administrator in exact conformity with the requirements of the Code of

Succession of Romero.

Practice, articles 984 *et seq.* If any prescription was applicable to this acknowledged claim thereafter, it could only be that of ten years.

The accounts of Cleoma Romero, Aristide Romero, and other heirs were sworn to before a justice of the peace as being correct, a practice that has grown up in this State, to serve what purpose it is, difficult to conjecture. They were never acknowledged by the administrator, and are prescribed.

The commissions of the administrator were rightly reduced to two and a half per centum upon that part of the succession property that he had already administered. The practice of administrators charging their full rate of commission upon the whole of the inventoried property before their final account, and consequently before it can be known that they will administer the whole succession, is apt to entail upon estates double commissions when, as in this case, there have been two administrators.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be reversed as to that part thereof which sustained the opposition to the note of Sylvestre Romero, and that said claim remain on the tableau of distribution of the administrator as classified by him, and that in all other respects said judgment is affirmed, the costs of the oppositions to Sylvestre Romero in both courts to be paid by the opponents, and all other costs to be paid by the appellants.

29	495
1116	666

No. 987.

SUCCESSION OF J. B. GUILLORY. OPPOSITION OF HEIRS.

Parol evidence is admissible to explain, but not to vary a written instrument. Slaves given to children by a father, or mother, having been destroyed without their fault (by the late war between the States) are not subject to collation. C. C. 1250.

A PPEAL from the Parish Court, parish of St. Landry. *Reid, J.*

Lewis & Brother, for succession and appellee.

A. Bailey and *Joseph M. Moore*, for the heirs.

The opinion of the court was delivered by

MANNING, C. J. Jean Baptiste Guillory died in 1875. His administrator has filed an account and tableau of distribution, which is opposed by some of the heirs.

In 1860 the decedent and his wife made a donation by notarial acts to six of their children—to each one a slave valued at eighteen hundred dollars and a small sum of money—and the donors declared that the gift

Succession of Guillory.

is made as an advance upon their inheritance, à titre d'avancement d'hoirie, and imposes upon them the obligation of collating it. The donees accept without reserve. In some of these acts the donation is in form of money, but they were accompanied or followed by other acts in which the donor appears in the character of vendor of the slave, receiving from the donee (who is vendee therein) the price in money, which is a part of the sum just donated.

In 1872 the donor by notarial act declared that all of these donations were in reality of slaves, valued in the sum above mentioned, and that they are to be considered null and void, and that the conditions and requirements therein mentioned "be considered as if no donations had been made, as the property donated proved to be useless to the donees on account of the emancipation thereof."

In the following year the decedent and his wife made another formal notarial act of explanation, renunciation, and discharge in favor of their children, the recitals and declarations of which are in accord with those previously made. This act appears to have been executed out of abundant caution, in order that the real intent of the parties may not be left in doubt, and contains the renewal in even more explicit words of the release of the children from the obligation of collating any thing but the money actually received by them.

Shortly after the death of Guillory, viz.: in 1876, his heirs by notarial act of partition treated his estate as a common inheritance, in which all had an equal share, by dividing equally among themselves the cash on hand, and they all agreed to give the surviving widow twelve hundred dollars in consideration of her release of her claims in community.

The administrator effectuates these intentions of his intestate in the account now attacked, and distributes the funds in accordance with them. The opponents maintain that the heirs should be charged with the full amount of the donations, which of course includes the value of the slaves.

The administrator answered the oppositions, and objection was made to his filing the answer on the ground that it was a replication, which our system of pleading does not permit. The objection was good; but we must confess that the statement in that answer of the basis upon which the account is made places the issue in bolder relief, and enables us to seize the salient points of the contestation with more readiness. If it had been incorporated in the petition accompanying and presenting the account the same useful purpose would have been served, and it would have been relieved of the objection to its form and to the place assigned it in the pleadings.

The refusal of the administrator to charge the heirs, who were donees of the slaves, with their expressed value is based upon the inhibition of

Succession of Guillory.

the constitution against enforcing contracts for the sale of slaves, and the jurisprudence of the State, which is claimed to be settled by numerous decisions of this court. The opponents reply that these donations were executed contracts, by and under which the donees became owners of the slaves, and *res perit domino*.

Parol testimony was offered and received to support the recitals in these donations, to which objection was made upon the ground that such testimony was not admissible to vary or contradict the written instruments. But the object of the testimony was not to vary or contradict the recitals in the written instruments, but rather to elucidate and explain them. Indeed, these written instruments taken together explain themselves and do not leave the intentions of the donors in doubt.

The opponents then maintain that the money or property given to these children must be collated unless the donor has formally expressed his will that what he thus gave was an advantage or extra part, and that the contrary was expressed by the donor in these acts, and that if upon calculation of the value of advantages thus given, and of the other effects of the succession, such remaining part shall prove insufficient to give to the other children their legitimate portion, the donee would then be obliged to collate the sum received by him so far as necessary to complete such portion. Civil Code, articles 1309, 1312 (new Nos. 1231, 1234).

We think another provision of our Code furnishes the true clue to the solution of the present controversy, and that is the provision that immovable property given by a father, mother, or other ascendant to one of their children or descendants, which has been destroyed by accident while in the possession of the donee, and without his fault, previous to the opening of the succession, is not subject to collation. If, on the contrary, it is by the fault or negligence of the donee that the immovable property has been destroyed, he is bound to collate to the amount of the value which the property would have had at the time of the opening of the succession. Civil Code, art. 1328 (new No. 1250).

The property donated by this decedent and his wife to their children perished by the accident of war, and without their fault, and is not therefore subject to collation, and the omission of the administrator to charge them with its value was right and proper.

This disposes of the main issue in this case. The other objections made by the opponents to the account were considered by the judge of the court *a qua*, and correctly disposed of by rejecting some of them and amending the tableau in conformity with others. The judgment thus rendered is in accordance with the law and the evidence; and

It is therefore affirmed, the costs of this court to be paid by the opponents.

ON APPLICATION FOR REHEARING.

The opinion of the court was delivered by

MANNING, C. J. The opponents in applying for a rehearing urge upon us the fact that the obligation of the donees was fixed by the law in existence at the time of the act of donation, and seem to suppose that our judgment was affected by or based upon the change in our laws relative to property in slaves. This was not in our minds. We purposely divested the question of whatever influence that change in the law might have had in the absence of that provision of our Code which controlled our judgment.

The article 1328 of the Civil Code (new No. 1250) was a part of the law at the time the act of donation was passed, equally with those relating to collation cited by opponents in their application for rehearing. It was unnecessary for us to go into an examination of the effect had upon contracts by the changes in our laws relative to slaves, so far as they formed part of the consideration of such contracts.

Independent of these changes, and independent of the provisions concerning collation of the different kinds of property, there is that in article 1328 that imperatively prescribes that immovable property given to one of the children, that has been destroyed by an accident without his fault, is not subject to collation at all, and because the property donated in the case before us had been thus destroyed, we decided that it should not be collated.

The rehearing is refused.

No. 961.

JAMES TODD VS. M. T. GORDY, SHERIFF, ET AL.

If the property pointed out by a debtor to his seizing creditor is incumbered by recorded liens which exceed its value, the creditor may disregard the debtor's election, and seize other property of the latter.

When a third person intervenes in a suit, and by an illegal order of court takes possession of property involved in the suit, on executing a bond for its value, he, and his surety will be liable on the bond. Such a bond, though not a judicial bond, is a binding conventional obligation for its full amount.

A PPEAL from the Third Judicial District Court, parish of St. Mary, Train, J.

F. L. Gates, E. Simon, and Allen & Foster, for plaintiff and appellant.
D. Caffrey, for appellee.

The opinion of the court was delivered by

MANNING, C. J. Wilson McKerral, a judgment creditor of James Todd, with recognition of mortgage upon the Arlington plantation, issued exe-

Todd vs. Gordy, Sheriff.

cution, and by his direction the sheriff levied upon twenty hogsheads of sugar for its satisfaction. Before levying the writ of *feri facias*, the officer required the judgment debtor to point out property for seizure, who accordingly designated the mortgaged premises for that purpose. The officer refused to seize that property under instructions of McKerral's counsel, because it was burthened with anterior mortgages sufficient in amount, as appeared from the mortgage books, to cover its full value. Todd refusing to point out other property, the sheriff seized sufficient sugar to satisfy the judgment, and the debtor enjoined its sale.

J. B. Lyons intervened in this injunction suit, alleging that he was pledgee of the sugar for supplies and advances used in its cultivation, and upon application to the court was permitted to take possession of it, and gave bond for its restitution or its value. The defendant, McKerral, took a rule to set aside the order permitting Lyons to bond the sugar, and on its trial the order was vacated as having been made in error, and, it being impossible to restore the sugar to the possession of the sheriff, because of its removal, McKerral prayed that Lyons and his surety be ordered to deposit its value in court, and this was refused.

From this order of refusal the defendant appealed. The trial, however, proceeded, and resulted in a dissolution of the injunction without damages, and a dismissal of the intervention. We are asked to dismiss the appeal from the interlocutory order. It would be inutile either to consider or to dismiss it. The whole case is before us, and a decree upon the final judgment will dispose of all the issues.

The ground of complaint of plaintiff is that his mortgage creditor having elected not to proceed against the mortgaged property, and having called on him to point out property for seizure, refused to seize what was specifically pointed out to him, and did seize movables for the satisfaction of his judgment. His construction of the directions of the Code of Practice (articles 646-8), is that when the creditor declines or refuses to exercise his rights upon property specially mortgaged to him, and calls on the debtor to point out property for seizure, he is bound to pursue first that which has been or is thus specially pointed out by the debtor, and can not pursue any other until he has exhausted that. If the correctness of this construction be admitted in its entirety, it is also true that where the property thus pointed out by the debtor is so incumbered by liens, mortgages, or privileges anterior to that of the seizing creditor that its sale will not probably satisfy the claim of that creditor, he can lawfully disregard the selection of property made by the debtor for seizure, and proceed against other property in the mode and according to the order prescribed by the Code.

And such was the fact here. The records of the mortgage office disclosed a vendor's lien for eleven thousand dollars, and a recorded inven-

tory of over ninety thousand dollars of property belonging to a minor, of whom Todd was co-tutor, both of which primed the mortgage of the defendant. And it is not pretended that the value of the property equaled the aggregate of these two sums. It is, however, said that this last was but a shadow resting upon the property, and proof was tendered to show that nothing was due the minor, or that the lien thus, in appearance, clogging the property had no real existence. To this it was excepted that the examination of the minor's affairs could not be made in this action, and this was neither the time nor the occasion for ascertaining whether the lien which confronted the defendant at the time of seizure was rightfully or wrongfully there. If there wrongfully, it was the plaintiff's and debtor's business to have removed it before.

Unquestionably this was right. When the judgment debtor points out property to his creditor for seizure, he can not complain if that creditor disregarded the selection, when he finds it incumbered upon the mortgage records by liens exceeding its value. If he wishes to secure to himself in its fullness the right to point out his mortgaged property to any seizing judgment creditor, he should take care that no liens should remain upon the records, save those which have actual existence.

The seizure of the sugar was therefore made by the defendant in the exercise of his legal right, and the process of injunction, by which he was restrained from making the proceeds of its sale available for the payment of his debt was wrongfully employed. He prayed damages, which were not allowed by the lower court, and we shall amend the judgment in that respect.

And here it becomes necessary to consider the effect of the judgment of the lower court. It dissolved the injunction, but meanwhile an intervenor had removed the property seized, under authority of the court, leaving a bond to represent it, which it is said is of no validity, because executed under an illegal order, so that the judgment debtor enjoins the sale of his property under the pretext that his creditor must first discuss other property incumbered on the face of the record beyond its value, and while the creditor is thus fast bound by the cords of the law, another creditor whose interest the debtor feels himself "morally and legally bound to protect," intervenes and bonds by proxy the seized property, removes it, converts it to his own use, and leaves a worthless paper to represent the tangible property, the sale of which would have satisfied his claim. Courts of justice are but a mockery if they can not find and apply a remedy for such trifling with their procedure.

The bond thus given by the intervenor is not a judicial bond. The court had not authority to direct that it should be taken. The intervenor was an interloper in this contestation, and should not have been permitted to take the property. But he did take it, and at the moment

of taking it covenanted that he would restore it when the court should so order, or pay its value. He can be compelled to perform his covenant by an action upon the bond. Not being a judicial bond, the process for the enforcement of those instruments can not be invoked by him, but it is a conventional obligation upon which himself and his surety can be pursued.

There were four executions enjoined, and all have been included in one transcript and cumulated. Two of them were for the American Colonization Society, and the plaintiff produces in this court receipts of that society for the payment of its judgments, and moves for the dismissal of those appeals, and it is so ordered.

Two other appeals are from the judgments dissolving the injunctions against McKerall's process, and these are the cases we have been considering.

This transcript is the most ill-arranged and badly prepared of any we have yet examined, and furnishes a fitting occasion to say to the clerks of the lower courts that we shall hereafter enforce the rule which provides for the preparation of a new transcript at their expense, if the transcripts in future appeals are made in disregard of the directions contained in that rule. These directions are contained in Rule I, and are accessible to all persons, and easily understood. An officer who desires to perform his duty can not fail with small effort to ascertain from these directions what is required of him; and as a return of the transcript for its improvement or entire rewriting will entail delay in the hearing of the cause by operating a continuance, it behooves those who would avoid such delay to take care that transcripts are not laid before us in such disorder as was confessed in the oral argument in this cause characterizes this one.

It is ordered, adjudged, and decreed that the judgment of the lower court be amended by awarding to Wilson McKerall five hundred dollars special damages as attorney's fees in the two cases, and twenty per centum upon the sum enjoined as general damages, and, as thus amended, that it be affirmed with costs of both courts. It is further decreed that the appeals from the judgments in the suits where the American Colonization Society is a party be dismissed on motion of appellant and at his costs.

Herrmann & Vignes vs. Fontellieu.

No. 976.

HERRMANN & VIGNES vs. L. FONTELIEU, ADMINISTRATOR, ET AL.

In an action to annul a sale of property made by an administrator, he must be made a party.

A suit to annul an administrator's sale is not of a probate character, and, if the amount involved is large enough, should be brought in the district court.

In sales of succession property, even to pay debts, the property must bring the *full amount of its appraisement*, or be subsequently sold on credit. But such sales, even when the property is sold below its appraisement, will not be disturbed if it be shown that the property brought its *actual value*.

A PPEAL from the Sixteenth Judicial District Court, parish of Vermillion. *Mouton, J.*

F. R. King, for plaintiffs and appellants.

Joseph A. Breaux, for defendant.

ON REHEARING.

The opinion of the court was delivered by

MANNING, C. J. Laodice Fontellieu administered upon the succession of his brother Paulin, and obtained from the parish court of Vermillion an order for the sale of the property of the deceased, and on the eighteenth of November, 1875, adjudicated it to Ernestine Fontellieu, the wife of his brother Theodore.

In the following June, the plaintiffs, who are judgment creditors of the deceased, instituted this suit against the administrator and the purchaser, the object of which is to annul this sale. The grounds of nullity are:

First—That no order of sale was in force at the date of the sale.

Second—That the sale was made without a commission therefor from the court.

Third—Want of legal advertisement.

Fourth—The sale was for payment of debts, and the bid was less than two thirds of the appraised value in the inventory, and less than one fourth of the actual value of the property.

Fifth and sixth—The purchaser was cognizant of the irregularities of the proceedings, and entered into a combination with the administrator to sacrifice the property and obtain it for an inconsiderable sum; and,

Seventh—That no price was paid.

The defendants excepted to the action—the purchaser, because of non-domicile in Vermillion parish, she being a resident of Iberia—the administrator for the same cause, and also because the action is not maintainable against him, but only against the heirs, if at all, and the same issue has been made in another suit, and decided adversely to plaintiffs, and upon this is based the plea of *res judicata*. It is also excepted that the probate court alone has jurisdiction of this action. Thereupon the plain-

Herrmann & Vignes vs. Fontellieu.

tiffs dismissed their suit against the administrator, and the trial was upon the issue presented by the purchaser.

This voluntary act of the plaintiffs will prevent us from making a final disposition of the suit. The vendor is a necessary party to an action the object of which is to annul a sale made by him, and we shall remand the case in order that the plaintiffs may put their pleadings in such shape as will justify the judgment they seek, and shall dispose of some of the issues made here, in order to facilitate the trial hereafter to be had.

The exceptions were overruled, and the defendant, Ernestine Fontellieu, answered that the action can not now be maintained, since the administrator is no longer a party to it; that the plaintiffs can not retain the price and at the same time annul the sale, and that the proceeds of sale have been distributed, and the decree of annulment would be virtually the reversal of the decree of the parish court.

There was judgment for defendant, and the plaintiffs appeal.

The previous judgment, pleaded as *res judicata*, was rendered upon an opposition of plaintiffs and others to the provisional account and tableau of distribution of the administrator. Our predecessors remarked upon that suit that it was an attempt to annul a judicial sale by a collateral proceeding to which the vendee is not a party. Succession of Paulin Fontellieu, Opinion Book. So far, therefore, as the question of annulment is concerned, not being before the court, that part of the judgment which relates to that issue may be regarded as *obiter dicta*, and not pleadable as the thing adjudged. One of the requisites needful to sustain that plea, viz., identity of parties, is wanting, and furnishes an additional reason for the rejection of that plea as a bar to the present demand.

The suit was properly brought in the district court of Vermillion. The proceeding is not probate in its nature, and the land is of value requiring the jurisdiction of the district court, and its situation in that parish determines the jurisdiction, though the residence of the defendant is in another.

To remand the case without some observations upon the grounds of annulment would leave the parties in the same incertitude in which they were at the inception of these proceedings, and silence upon the *dicta* in the opinion rendered in the previous case might well be construed into acquiescence in their correctness.

The sale is unquestionably null. The orders of the thirteenth of October were not complied with, and they were certainly within the competency of the court. Notwithstanding a pending proceeding for the dismissal of the administrator for want of sufficient bond, and notwithstanding the special designation of the sheriff as auctioneer to make the sale, the administrator precipitated it with indecent haste, forgetting to make

advertisement himself, though he had assumed to discharge the function of an auctioneer, which the law permits as to the property he is administering, but only when the court has failed to designate an officer to that end. The published notice of sale is signed neither by himself nor by any auctioneer, but by the clerk of the court, and, though its date is the sixteenth of October, 1875, the public is notified that the sale will take place on the eighteenth of the previous month. No doubt this last is a clerical error, but it behooves those who are requiring of others a rigid compliance with the technical formalities of law, to take care that their own proceedings, which they are pleading as *res judicata*, shall not be obnoxious to criticism.

The creditors were not silent while these hurried preliminaries to the sale were being conducted. The present plaintiffs warned the administrator and the purchaser of the consequences of this unseemly haste, but the mock offering and adjudication of the property took place, and the first lot of ground on the inventory, appraised thereon at fifteen hundred dollars, was adjudicated to Ernestine Fontelieu, who is the wife of the administrator's brother, at two hundred dollars. We are not to be understood as intimating that it is improper, much less illegal, for a brother of a decedent to sell through the formalities of the law the property in his fiduciary keeping to another brother or to his wife. Family arrangements for the preservation of property to those who are nearest in blood and sympathy to the deceased are not to be discountenanced, nor to be esteemed even *prima facie* wrongful, but they must be made in subordination to and with strict regard to the rights of creditors. These arrangements are not likely to be successful when the officer of the law, whose function is specially to protect those rights, openly contemns them, and disregards both the form and substance of that law which was made for their conservation.

We are constrained to state our dissent from the proposition enunciated in the opinion of our predecessors, that "it is now well settled that a sale of succession property to pay debts may be validly made for less than two thirds of the appraisement."

The validity of the sale of succession property in no wise depends upon the bid being more or less than *two thirds* of its appraisement. That is the proportion or quantum of the appraisement that must be bid at a sale under execution or executory process. It is a mistake to suppose that all the rules of execution sales apply to those of succession property. The statement of Mr. Hennen, in a modified form, that "the rule of execution sales applies to those of succession property" (Hen. Dig., p. 1492), is an alteration and enlargement of the syllabus of the decision in second Louisiana Reports, to which he refers (*Elliott vs. Labarre*, 2 La. 327), and is not justified by the words or spirit of the opinion of the court

then rendered. These words are that the authority of the judge of probate is necessary to sell succession property, and the person or officer who made the sale did not have it, and Mr. Justice Porter adds, "it may be properly assimilated to the judgment and execution which are a sheriff's authority."

The rule as to the sum necessary to be bid at a succession sale for payment of debts has been widely misunderstood, and variously applied, but there has not been any authoritative declaration, such as that just mentioned, until it was made at the last term of this court. Each one of the authorities there quoted has been examined, and none of them asserts that doctrine, except that in 10 Rob., Valderes vs. Bird, p. 398, it is stated that when the sale is made to pay debts the property may be sold for less than the appraisement. Before that decision, this court had said that a sound interpretation of the provisions of our legislation relative to the administration of successions will, in many cases, authorize a departure from the rule which requires the property of minors to bring its appraised value at a sale. Towles vs. Weeks, 7 La. 312.

In a later case (succession of Fritz, 12 Annual, 368) the formal enactments of the Code of Practice (articles 990-2) were recited, and these unmistakably prescribe that when the property of a succession is sold to pay debts it must bring its appraised value in the inventory, and, if no bid of that amount be made, the property must be re-advertised, and the second sale must be on a credit of twelve months. At that sale the property can be legally adjudicated at any bid. But that case was clogged with the feature that minors were interested.

The rules providing for the sale of succession property are in many respects different from those that relate to the sale of minors' property, and it is well settled that a sale to pay debts of a succession is not subject to the requirements for the alienation of minors' property when the beneficiary heirs have only a residuary interest to be ascertained by a full and complete administration.

Notwithstanding the unambiguous expressions of the Code of Practice upon this subject, it has in many cases been held that although as a general rule succession property can not be sold, even for payment of debts, for less than the full appraised value at the first offering, yet sales for less than that value will not be disturbed if there be proof that the price at which it was adjudicated is its actual value. And this ruling is now so deeply imbedded in our jurisprudence that it must be adhered to, and will be the guide by which to test one of the objections made to the sale attacked in this case.

It is manifest from what we have here said that we consider the sale of succession property made by the administrator and purchased by the

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defendant as null, and that the plaintiffs are entitled to an opportunity to have that nullity declared judicially.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court is avoided and reversed, and the case is remanded for proper parties to be made, and for further proceedings therein, the costs of appeal to be paid by the defendant.

No. 980.

A. TERTROU VS. C. C. DURAND ET AL.

The probate court in which a succession is opened has jurisdiction of all suits to destitute the administrator and all demands involving his duties.

Two or more demands, not exclusive of each other, may be properly cumulated in one suit.

A PPEAL from the Probate Court, parish of St. Martin. *Fournet, J.*

Joseph A. Breaux, William F. Schwing, and L. J. Gary, for plaintiff and appellant.

Felix Voorhies and Martin Voorhies, for defendants.

The opinion of the court was delivered by

SPENCER, J. Plaintiff brings this suit in the parish court of St. Martin:

First—To enjoin as extinguished by compensation a judgment for damages for two hundred and fifty dollars, interest, and costs, rendered against him in the same court in favor of the administrator of the estate of Durand, the defendant.

Second—To compel the administrator of said estate and the sheriff to complete and deliver to him a deed of certain property bought by him at probate sale of said estate, made under order and decree of said court, and to obtain possession under said adjudication, and to declare void a subsequent adjudication made to said administrator and his brother of the same property.

Third—To remove said administrator from office for malfeasance in his administration.

The defendant moved to dismiss plaintiff's proceedings and suit on the following grounds:

First—*Lis pendens*, for that plaintiff had brought the same suit in the district court for St. Martin.

Second—That there is an illegal cumulation of demands in plaintiff's petition.

Third—That said injunction should be dissolved, first, for insufficiency of bond; second, because the plaintiff does not allege that his property

Tertrou vs. Durand.

has been seized and advertised, but merely that the sheriff is *annoying* and *harassing* him, and is *about to sell* his property, which is insufficient; third, because the court is without jurisdiction *ratione materię* to declare the nullity of said second adjudication, or to liquidate plaintiff's claim; fourth, because Tertrou's claim, pleaded in compensation of said judgment, is a contested and unliquidated one; fifth, because, even if liquidated, it can not be pleaded in compensation of a judgment for special damages and costs due to third persons.

There was judgment dismissing plaintiff's suit as to his second and third demands above stated for want of jurisdiction. His first demand was rejected on the ground that plaintiff's claim is not such a liquidated claim as can be pleaded in compensation by way of injunction, which the court dissolved, with one hundred and fifty dollars special damages as attorney's fees.

This judgment is clearly erroneous. The parish court having jurisdiction of the settlement of the estate of Durand, and having ordered the sale in question, is the only proper tribunal to compel the administrator and sheriff to do their duty and to make deeds to purchasers, and, incidentally, to adjudge illegal the second adjudication. It is, likewise, the proper and only tribunal to decide upon the demand for destitution of the administrator.

There is no dispute as to its jurisdiction to try the injunction. Hence we find all the matters alleged by plaintiff to be properly cognizable by the parish court, and, therefore, not within the jurisdiction of the district court. Hence the suit in the latter can not be *lis pendens* to this suit, but is *coram non judice*.

We think there is no force in the defendant's objection that the demands of plaintiff are improperly cumulated. There is no inconsistency between them, and there is no good reason why a party having three demands, not exclusive of each other, should not unite them in one suit, and thus diminish litigation. The administrator is the principal and real defendant, the others being only incidentally connected with some of the issues.

We can not pass upon the correctness of the decree so far as it dissolves the injunction and inflicts one hundred and fifty dollars damages, for the reason that the case can not be tried piecemeal. But we must say that the damages awarded, one hundred and fifty dollars, for defending an injunction suit of an amount not exceeding three hundred dollars, is unreasonable and excessive.

Perhaps it would not be amiss for this court to state, with the view of facilitating a settlement of the vexatious litigations in this matter, that this court has recently held, in the case of "Succession of D. Triche," that a special mortgage creditor, purchasing the property subject to his

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mortgage at probate sale, may retain the price until settlement of the estate upon giving security to refund such part as may be found due on final settlement.

This case must be remanded.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and reversed, and that this cause be remanded to the court below to be proceeded with according to law, defendants paying costs of this appeal.

Nos. 7077. and 7079.

VALERY THIBODAUX VS. J. N. KELLER, AND HOWELL & KELLER VS. VALERY THIBODAUX. CONSOLIDATED.

The tax-sale of property which has been assessed, and sold as the property of one who is not the owner, conveys no title to the purchaser.

The tax-sale of property is fatally defective, if the assessment or the advertisement under which the sale is made, contains no description of the property sufficiently specific to clearly identify it.

The assessment stands in lieu of a judgment. It is the foundation of all which follows, and must contain an accurate and sufficient description of the property, as required by the statute.

The want of such description in either the assessment, the advertisement for sale, or in the tax-title is fatal to such title.

A PPEAL from the Third Judicial District Court, parish of St. Martin.
Train, J.

James E. Mouton and Louis J. Gary, for plaintiff and appellee.

Felix Voorhies and Martin Voorhies, for appellants.

The opinion of the court was delivered by

EGAN, J. The motion to dismiss the appeal is too general in terms, except as to the matter of time of taking appeal, in which we see no error. Neither does there appear to be error in making the appeal returnable to the June term, 1877, instead of 1876. The order was granted on the fifth of June, 1876, and the judge *a quo* expressly states that there was not sufficient time to bring up the appeal to the term beginning on the first Monday of the same month. We think he did not err, and that there do not appear any such irregularities as would authorize dismissal of appeal. The appellee has not named them, and we do not perceive them. The motion is overruled.

Case 7077 is an injunction suit brought by Thibodaux, claiming to be the purchaser at tax-sale of a certain steam-mill, etc., to prevent their removal by the defendants and appropriation to their own use, "because he has been apprised that defendants have expressed their intention to remove the mill, etc., and that they intend to put up the machinery,

29	508
49	1463
29	508
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111	486

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mill, and buildings in the parish of Iberville." He further prays to be decreed the owner of the property.

The defendants moved to dissolve the injunction on several grounds, of which it is only necessary to notice the substantial statement that the allegations of the petition are insufficient to warrant injunction; that there are no facts or acts alleged as the grounds of injunction, nor any acts alleged to be done or about to be done by defendants, but only that the plaintiff has been apprised that they have declared their intention to remove; and the plaintiff does not even allege that he fears and believes that they will attempt or carry out that expressed intention, or that they are about to do so, and for aught the allegations of the petition disclose they might never do so. We do not think these allegations sufficient.

The injunction must be dissolved with one hundred dollars damages as counsel fees against the plaintiff and his surety on bond for injunction, Jean Baptiste Arnas Guidry, *in solido*. The demand to be declared owner of the property by virtue of the alleged purchase at tax-sale will be considered in conjunction with suit 7079, with which suit 7077 was consolidated, and which involves that title also.

Suit 7079 was instituted by Joseph M. Howell and François Nicholas Keller, composing the commercial firm of Keller & Co., domiciliated in the city of New Orleans, to annul and set aside and to have declared null and void the alleged tax-sale to Thibodaux of the steam-mill, buildings, fixtures, etc., in controversy, also to recover possession, of which it is alleged they were illegally deprived, to quiet plaintiffs' title to the property, and for one thousand dollars damages for the illegal acts of defendant, Thibodaux, and the privation of the use and enjoyment of their property.

Of the grounds of objection to the tax-sale it is only necessary to notice these: First—That the property seized and sold for taxes belonged to Keller & Co., and not to J. N. Keller, in whose name it was assessed and as whose property it was sold. It is immaterial to consider whether J. N. Keller and François Nicholas Keller or F. N. Keller are the one and the same, or whether, if the property belonged to F. N. Keller, the assessment in the name of J. N. Keller would suffice. It is both alleged and proved that the property in question belonged not to F. N. Keller or J. N. Keller, but the firm of Keller & Co., of which the plaintiff, Howell, was a member, and which, by all authority, was and is perfectly distinct from either or both the individuals composing it. As the assessment stands in lieu of a judgment, and as, if there be no assessment or judgment against the true owner, there can be no valid sale, this alone would be sufficient to avoid the alleged tax-sale to the defendant, Thibodaux. There are, however, two other objections to the validity of the

tax-sale, each of which is fatal. The first is the want of an accurate or sufficient assessment or description of the property. The only description is as follows:

"State of Louisiana, parish of St. Martin; assessor's list of taxable property of Mr. J. N. Keller; 'description of real estate: Real estate and machinery of a saw-mill, \$3000.'"

The location of the real estate or of the saw-mill or machinery is in no manner given, nor is there in the assessment any clue or guide by which it can be ascertained or made certain. There is no date, no description, no boundaries, no location. Such an assessment is no compliance with the requirements of the law, even if made in the name of the true owner. An illegal or insufficient assessment is a radical defect. 15 An. 15; 14 An. 709. Judge Cooley says "assessment is the foundation of all which follows it;" and in making it the provisions of the statute under which it has been made must be followed. This has not been done in the case at bar.

The advertisement of the tax-sale is equally defective and bad for uncertainty. The property is only described as "buildings, saw-mill, and machinery, assessed in the name of J. N. Keller." From this description alone who could tell what was sold and what was bought or offered for sale? How could successful or remunerative bidding be induced by such description or such offering? That it was not is evident from the fact that property proved to have been worth at least three thousand dollars, and estimated by some of the witnesses at over four thousand dollars, was bid in by the defendant, Thibodaux, and adjudicated to him by the tax-collector at the sum and price of \$144 16 $\frac{1}{2}$.

The same defects and uncertainty of description pervade the tax-titles, both of the collector and Auditor, issued to Thibodaux, in which the description of the property conveyed is, if possible, even more defective than in the assessment and advertisement.

This would seem to be commentary enough upon the manner in which the property of citizens has been wrenched from them under the forms of law. It may be well to remark that the land upon which the mill-buildings and machinery in this case were situated did not belong to Keller & Co., or to any member of that firm, but was leased from one Sosthene Leonard at the price of one thousand dollars per annum. They were not real estate at all, nor attached to the realty so as to be immovable, but were personal property; so that here was an additional ground of objection to and even in the assessment. It appears also from the evidence that Thibodaux was in possession of the mill and other property in question under lease at the date of the tax-sale, and availed himself of that circumstance to retain possession under his pretended tax-sale in anticipation of the lapse of the time for redemption

Thibodaux vs. Keller.

within which he was not entitled to be put in possession, as his title, even if the proceedings were regular, was only inchoate.

As to the damages other than those allowed as attorney's fees on dissolution of injunction in case 7077, the evidence is not sufficiently full or specific to enable us to award them at this time or in this suit.

It is therefore ordered, adjudged, and decreed that the judgment of the court below in these consolidated cases be annulled, avoided, and reversed; that the injunction sued out by Valery Thibodaux in case 7077 be dissolved, with one hundred dollars damages against himself and his surety on injunction bond *in solido* as attorney's fees for dissolution and trial of injunction in that case; that the demands of said Thibodaux in said suit 7077 be disallowed and rejected; and that plaintiffs in suit 7079, to wit: Joseph M. Howell and François Nicholas Keller, composing the firm of Keller & Co., do have and recover judgment decreeing them to be the owners and entitled to recover and be put in possession of the steam-mill, engine, fixtures, buildings, and other appliances and property attached to and used therewith, sued for in said suit 7079 of the docket of the district court of St. Martin, with the right hereafter to establish and recover any and all damages suffered and caused by the acts and fault of the defendant, Thibodaux, in the premises, by reason of his possession, removal, or appropriation to his own uses and purposes of the said mill, machinery, etc., and any deterioration of value or loss resulting therefrom; and that the alleged tax-sale and title, both from the tax-collector, and the Auditor, set up by him, be annulled and set aside. It is further ordered that said Thibodaux pay the costs of both courts.

No. 975.

ARVENNE HÉBERT ET AL., ADMINISTRATORS, vs. F. D. LÉGE, ADMINISTRATOR, ET AL.

As between parties to a written act of sale, and the heirs of such parties, *parol* evidence is inadmissible to show the act to be simulated. Only a counter-letter can avail such persons.

Before the administrator of a decedent can show by *parol* the simulation of a sale made by the latter, he must allege, and prove, that the sale was in fraud of creditors.

A mere trespasser can not put at issue the title of the person who is in possession, as owner, of the property trespassed on.

APPPEAL from the Sixteenth Judicial District Court, parish of Vermillion. *Mouton, J.*

F. R. King, for plaintiffs and appellants.

R. P. O'Bryan and *W. W. Edwards*, for defendants.

The opinion of the court was delivered by

SPENCER, J. This is an action by plaintiffs against defendants for

trespass. They allege in substance that the estate of F. E. Dartez, by them administered, is owner and in possession of a certain piece of land, and of certain buildings and fences thereon, as evidenced by two deeds duly recorded, one dated in 1868 by authentic act, and one in 1872 by private signature. By the former Julien Dartez sold to his brother, F. E. Dartez, the buildings and fences on said land, and by the latter the land itself. The defendants are F. D. Légé, administrator of Julien Dartez, and his brother, Fergus Légé. Plaintiffs charge that these parties, with full knowledge of their possession and rights in said property, and in defiance thereof, and notwithstanding their protest, unlawfully entered upon said property, tore down and carried away the fences, and one of the houses, and were pulling down others, and had in part done so. They pray for an injunction, for three hundred dollars actual damages, and five hundred dollars as exemplary or punitive damages, and to be quieted in their title and possession. The injunction was granted.

Defendants answer, first by a general denial, averring that said property did not belong to F. E. Dartez, and denying the identity of the property described in plaintiffs' petition with that described in the deeds. They further aver that even if it be the same property, that said sales were mere simulations, and nothing was ever conveyed or intended to be conveyed by said sales.

On the trial below there was judgment for defendants, and plaintiffs appeal.

Defendants argue in their brief that this court is without jurisdiction; but we think otherwise. Outside of the claim of five hundred dollars punitive damages, the demand is for three hundred dollars actual damages, and to be quieted in their title and possession of the property, which is alleged to be worth more than five hundred dollars.

There are fifteen bills of exception in the record to rulings of the court in admissions and exclusions of evidence, but it will not be necessary to consider them in detail, as there are a few general and fundamental legal principles governing them all.

As between parties and their heirs (other than forced heirs of the vendor) the only admissible evidence of the simulation of a formal written contract is a counter-letter. The retention of possession by the vendor, upon which the district judge bases his decision, is a badge of simulation so far as "respects third persons," and as against such third persons "the parties must produce proof that they were acting in good faith, and establish the reality of the sale." C. C. 2480. But we repeat that as between the parties themselves and their legal representatives the act makes full proof, and its reality can not be disputed by parol. "An administrator can not prove by parol the simulation of his intestate's sale, unless *alleged to be* in fraud, or to the injury of creditors."

Hebert vs. Lege.

14 An. 610. "As between parties or their representatives, parol evidence is inadmissible to show simulation of written acts." 4 La. 167; 3 An. 154; 4 An. 487; 9 La. 566; 3 R. 457.

Creditors, and therefore administrators who represent them, may, of course, *under proper allegations*, attack the debtor's acts as simulated, and resort to every sort of evidence and presumption allowed by law to establish it. But in order to exercise this right, the creditors, or the administrator for them, *must allege* and prove that the act complained of so diminishes or affects the debtor's estate as, if maintained, it will deprive them of their rights. In other words, they must allege that the effect of the act will be to render insolvent the estate of the debtor. They must allege and prove that the debts due by the vendor existed against him at or before the date of the alleged simulated act. C. C. 1993. Hennen's Digest, p. 1123, No. 18.

Now, in the answer of the defendants there are none of these essential and necessary allegations. All the evidence offered by them tending to show simulation, and rejected by the court, and to which their bills of exception were taken, was inadmissible even in behalf of the defendant administrator, because there were no allegations to sustain it. As for the other defendant, Fergus L  g  , he had no capacity or right to raise the question of simulation at all, as he was neither creditor, heir, nor representative of either party to the act. He is sued as a trespasser, and, if such, he can not escape liability by denying plaintiffs' title. "A mere trespasser can not question the title of one possessing as owner." Hennen's Digest, p. 1058, No. 14; 7 N. S. 171; 1 R. 510; 10 R. 99. The defendants' other bills of exception were taken to evidence going to show the identity and locality of the property. It was properly admitted.

On the merits, plaintiffs have, we think, fully made out their case. They have produced formal acts of sale from Julien to F. E. Dartez of the property in controversy, and satisfactorily identified it. They have shown that they were peaceably in possession under those titles, and that although Julien Dartez resided thereon up to his death, he always acknowledged F. E. Dartez as owner, and represented himself as his agent. It is further shown that the defendants, with full knowledge of these facts, and against the protests of plaintiffs, under pretext that the property belonged to the estate of Julien, entered upon it defiantly, and, as they said, "under their own orders," and commenced to pull down the fences, buildings, etc., and did pull down and carry away about two hundred panels of fence and one house, and part of the chimney of another house. Such high-handed modes of enforcing what people may be pleased to imagine or allege to be their rights can not be countenanced by courts of justice, and deserve judicial reprobation. Even if their rights had been undoubted, the law does not tolerate such modes

Hebert vs. Lege.

of redress; and we are at a loss to understand how the district judge, even under his view, that the sale was simulated by virtue of the presumption of article 2480 of the Civil Code, could have concluded that that justified the violent and tortious acts of the defendants.

The judgment appealed from must be reversed. We think that the plaintiffs have shown damages to the amount claimed, three hundred dollars, and should be quieted in their title and possession of the property.

It is therefore ordered, adjudged, and decreed by the court that the judgment appealed from be avoided and reversed, and it is now ordered and decreed that the injunction sued out be perpetuated, that the plaintiffs recover of the defendants, François D. Lége and Fergus Lége, *in solido*, the sum of three hundred dollars, and be quieted in the title and possession of the property in controversy. It is further decreed that defendants pay costs of both courts.

No. 984.

THE STATE vs. EDWARD HUGHES.

The admissions, confessions, or declarations of a person accused of crime, can not be received in evidence against him, unless the witness who testifies to them, is able to state at least the *substance* of them.

A PPEAL from the Eighth Judicial District Court, parish of Calcasieu.
Hudspeth, J.

Ferreol Perrodin, District Attorney, for the State.

George H. Wells and *F. A. Gallagher*, for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. The defendant is appellant from a verdict of guilty and sentence to hard labor for life on a charge of murder. He assigns as error the rulings of the court on three points, two of which only need be noticed :

First—Thomas McMahon, a State witness, was asked by the district attorney to state a conversation he had with the prisoner relative to the homicide charged. "The witness thereupon saying that he had had such conversation with the prisoner, but that he could not remember said conversation, nor the substance thereof, the district attorney thereupon asked said witness to state to the jury what he could remember of what the prisoner had said in said conversation." The prisoner objected, "on the ground that the confessions or declarations of the

29	514
48	430
29	514
105	166

State vs. Hughes.

prisoner must be taken together," and that such confessions or declarations were inadmissible, "unless it appears that the witness can state at least the substance of said conversation." The court overruled the objection, and allowed the witness "to testify as to such portions of said conversations as he could remember," stating to the jury that the prisoner's objection "went not so much to the admissibility as to the effect of the testimony."

Second—The witness Landry, sworn for the State, "was asked whether he had ever heard any statements made by the accused, and, if so, what statements he had heard." "The witness stated that he had overheard a remark made by the accused from the jail window in the course of a conversation which he (accused) was carrying on with a little boy outside; that though he had noticed these parties in conversation before he arrived at the jail, and had left them in conversation, he had only heard the single remark to which he testified, while he was passing by the jail, and that he had not heard either the preceding or subsequent portion of the conversation of which this remark formed part." The accused made the same objection, and the court overruled it for the same reason.

We think the court below erred in both these rulings. An admission, confession, or declaration of a party can not be given in evidence against him, unless the witness testifying thereto can at least state the substance of all that was said. See Greenleaf, sections 201, 218, 165; 3 An. 359; 11 An. 49, 736; 3 N. S. 454; 9 R. 146; 9 A. 163; 26 An. 622.

We are not disposed to relax this salutary rule; for although such evidence, when we have satisfactory guarantees of its accuracy, may amount to the strongest proof, yet in a majority of instances, owing to infirmities of memory, or to inattention, or misunderstanding in those called to state conversations with others, it is not very trustworthy. It would be utterly unreliable if fragmentary portions of conversations were received, for then a man might be made to say directly the contrary of what he did say.

It is therefore ordered, adjudged, and decreed that the verdict and sentence appealed from be set aside and avoided, and that this cause be remanded for a new trial and to be proceeded with according to law.

No. 988.

DOMINIQUE LALANNE vs. FRANÇOIS SAVOY, PRESIDENT POLICE JURY, ET AL.

The police jury of a parish is liable for any actual damage caused to a neighboring inhabitant, by building any work of public convenience that obstructs an unnavigable water-course; but the jury will not, if the work be of great convenience to the inhabitants of the vicinage, be compelled to remove it.

A PPEAL from the Eighth Judicial District Court, parish of St. Landry. *Hudspeth, J.*

John N. Ogden and A. Bailey, for defendants and appellants.

Joseph M. Moore, for plaintiff.

The opinion of the court was delivered by

DEBLANC, J. In 1870 a dam was built and became a highway across the mouth of Bayou Toulouse in the vicinity of a small tract of land then belonging to Mrs. Henry Lastrapes. Shortly after the completion of the dam, Dominique Lalanne purchased from Mrs. Lastrapes the land so situated, and—on the tenth of May, 1876—filed this suit.

He alleges that the dam obstructs a natural drain which runs through his land, and he prays that defendants, the local representatives of the parish of St. Landry, be, in their official capacity, condemned to pay him, as damages, the sum of \$2500, and, besides, that they be commanded to remove the aforesaid dam. According to his own declaration, plaintiff has remained for nearly six years, witnessing the gradual destruction of his property.

The district court allowed him, as damages, the full value of his land, and ordered the removal of the dam. From that decree defendants have appealed.

Among the powers delegated to the police juries in the State, one of the most important is that "to cause any water-course which is not navigable to be filled up for the purpose of carrying the public highways over the same, providing no injury be thereby occasioned to the neighboring inhabitants." Revised Statutes, section 2743, No. 13.

Bayou Toulouse is not navigable; and, so far as relates to its condition, it is one of those that may be filled up, and over which the police jury had the right to carry the public highway.

In the language of the statute, have the neighboring inhabitants suffered from the action of the police jury?

Of the proprietors of that section of the parish, only one is before the court, and that one acquired the land he owns in that locality after the building of the dam. He was sworn as a witness in his behalf, and among other things he said: "Before buying the land I visited it several times during low water, in the summer and fall. I know the Toulouse

swamp; the bayou is the only drain for that section. With the exception of fifteen acres, the water thrown on my land has killed all my timber."

This is his own acknowledgment; he knew the swamp; he crossed the dam, and by merely casting a look on the ground which extends from the dam to the swamp he could have ascertained that then, as before, his land was subject to overflow. Nor is this all. His vendor and the inhabitants of that locality were certainly informed that, by virtue of an ordinance of the police jury, a levee would be erected across the Toulouse, and, nevertheless, they did not oppose any objection to either the project or its execution.

Can the inhabitants of a State, a parish, a city, a village, acting through their delegated agents, build causeways, bridges, and dams, and thereafter—denying the delegated authority—claim damages resulting to them from the acts of their own agents, from acts acquiesced in and ratified by an unbroken silence of nearly six years? They may; but on the ground, and none other, that in a matter of public necessity or public convenience, a right to them belonging has been abridged or destroyed; and that—on that account—they are entitled to a compensation proportioned to their loss.

Adopting that rule and applying it to this case, what is the extent of the loss suffered by plaintiff? Has he lost his land? He has not; but let us suppose he had. What is its value? He said twenty-five dollars, a disinterested witness said twenty-five cents, defendant, from two to three dollars an acre. The only value of that land consists of its timber, and the amount allowed to plaintiff by the lower court covers all that the land is worth, and, necessarily, the loss actually suffered.

We refrain from expressing any opinion as to the nature and extent of *servitude* which may be due from one another by estates situated in the middle or on the border of swamps, and on which, at regular periods, the water comes and flows from and in every direction. We leave for the future the discussion of that important question.

As to the plaintiff, he retains his land, on fifteen acres of which the trees have not been affected, and—besides—he will receive the entire value of the land. He can not ask, he can not expect, more; with that, his right of action against the parish is exhausted.

As to the dam, it may be an object of general utility, and, as regards its removal, we differ in opinion with our respected brother of the district court. If in so doing we are mistaken, our error can easily be corrected by the interested parties through the action of their police jury.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be annulled, avoided, and reversed, but so far only as it orders the removal or opening of the dam constructed at the mouth of Bayou Toulouse, and that in other respects said judgment is affirmed;

Lalanne vs. Savoy.

the costs of the lower court to be paid by defendants in their official capacity, the costs of the appeal by plaintiff.

DISSENTING OPINION.

EGAN, J. I concur in so much of the decree as reverses the judgment of the lower court which directed the demolition of the dam in question. I dissent from so much of the decree of this court as affirms the allowance of damages by the court below to the plaintiff in this case. The right to damages, if any, existed in favor of the vendor of the plaintiff, the person who owned the land at the time the dam was constructed and the bayou stopped. That right is not in my opinion one which runs with the land, like a servitude, in favor of any future owner. If the bayou constituted a servitude before, it ceased to do so after, the construction of the dam under authority of the police jury, and no other right remained except to compensation to the then owner. If the plaintiff's vendor did not lay claim to damages herself, then plaintiff, to whom she only transferred the land with the dam already built, and to whom she did not transfer her right to compensation or damages growing out of its construction, can not recover them in her stead. This would seem the more just and reasonable, as, if there was damage or apprehension of damage from the stoppage of the bayou and construction of the dam, the plaintiff doubtless got the benefit of it in his purchase at a correspondingly diminished price.

MARR, J. I concur in this dissenting opinion.

No. 985.

ZÉNON BROUSSARD VS ALCÉE DUPRÉ, ADMINISTRATOR.

Judgments of the courts of the country parishes only take effect from the last day of the term of court at which they were rendered, no matter on what day of the term they were signed. Hence, prescription of such judgments only begins to run from the last day of the term in which they were rendered.

A PPEAL from the Eighth Judicial District Court, parish of St. Landry. *Kenneth Baillio*, Judge *ad hoc*.

A. Bailey, for plaintiff and appellee.

Garland & Dupré, for defendant.

The opinion of the court was delivered by

MANNING, C. J. The plaintiff sues to revive a judgment rendered in February, 1867, in the parish of St. Landry. The judgment was signed

Broussard vs. Dupre.

on the twelfth of that month. The term of court at which it was rendered closed by adjournment on the eighteenth of same month.

Citation in this suit for revival was made on the fifteenth of February, 1877. The prescription of ten years is pleaded.

Judgments rendered in the courts of the country parishes have effect only from the last day of the term, whatever may be the day on which they shall have been signed. Code of Practice, art. 555.

The prescription of ten years will not apply to this suit for revival, unless the time be reckoned from the day when the judgment was signed. The defendant urges that the day when it was signed is the day of its rendition, but that is obviously inaccurate, because a judgment is rendered always before it is signed, and in some of the country parishes the excellent practice prevailed and now prevails of signing all judgments rendered during the term on the last day thereof, and not before.

The judgment of 1867 had effect only on and from the eighteenth of February of that year. It could not have been used as a judgment until that time, and that must be the day when it commenced its existence, so to speak, as a judgment. The legal duration of its life was ten years from its birth. To prolong that life, a citation for revival must be served before the expiration of the period limited for its continuance, and that was done in this case.

The term "rendition," employed in the statute of 1853, would be more naturally interpreted to mean the act of rendering a judgment than the act of signing it. But the general provision that all judgments rendered in the courts of this State, other than those of the First Judicial District, take effect only from the last day of the term of the court at which they are rendered fixes the time when the judgment is complete, and indicates the starting-point where prescription begins to run against them.

The judgment of the lower court was in accordance with these views, and it is therefore affirmed.

No. 927.

SUCCESSION OF CARMELITE PLANCHET. OPPOSITION OF V. VEAZEY.

Oppositions to the account of an administrator, and the homologation of the account, are parts of one suit, and should be passed on in *one* decree, and not in separate decrees.

No defect in a premature appeal taken from an interlocutory decree in a case, can prejudice the appeal subsequently taken from the final judgment in the case.

It is improper to appeal from a judgment by motion in open court, except during the term of the court at which the judgment was rendered; but if the appeal is thus taken at a *subsequent* term, and the appellee appear and file an answer, the defect will be cured, and the appeal maintained.

Property purchased during marriage, whether in the name of the husband, or the wife, becomes community property.

The surviving husband is absolute owner of one half the community property, and life-time usufructuary of the other half, which latter half the heirs of the deceased wife can not set up any claim to during his life.

A PPEAL from the Parish Court of the parish of Vermilion. *Kibbe, J.*

F. R. King, for opponent and appellant.

R. P. O'Bryan and Mouton & Debailon, for administrator.

The opinion of the court was delivered by

MARR, J. Carmelite Blanchet, wife of Valcourt Veazey, to whom she was married without nuptial contract, died, intestate, at the matrimonial domicile, in Vermilion parish, in February, 1864, without ascendants or descendants, her legal heirs being her brothers and sisters and the descendants of deceased brothers and sisters, her husband surviving. One of the heirs administered; and he caused all the movables and immovables which were in the possession of the spouses at the time of the death of the wife, to be inventoried, and all the movables to be sold as belonging to her succession.

In 1874 Valcourt Veazey obtained an order from the parish court requiring the administrator to account. On the sixteenth of October, 1874, he filed a "tableau of debts and charges and of provisional settlement in the succession of Carmelite Blanchet," and he prayed that the heirs be cited, and that the tableau be homologated after due publication.

Veazey opposed this tableau, alleging that the charges were excessive, and that he was entitled, after the payment of the debts, to one half the community as owner, and to the usufruct for life of the other half.

The opposition was maintained in part, and the court decreed that all the movables inventoried and sold in the succession, except certain objects which were proven to have belonged to the wife at the time of the marriage, and a tract of one hundred and sixty acres of land purchased during the marriage, belonged to the community; that certain amendments and corrections of the tableau should be made, and that all the expenses and charges of the administration should be borne by the com-

Succession of Carmelite Planchet.

munity. The court further decreed that, "as thus amended, the tableau be then homologated."

From this judgment, which was rendered on the third of May, 1875, the opponent and the administrator appealed, but the appeal was not prosecuted beyond the motion made in open court.

At the next term, in June, 1875, the court rendered a final judgment homologating the tableau as corrected and amended by the judgment of the third of May. Thereupon the opponent, by motion in open court, appealed from this judgment, and gave the requisite bond; and he also, by motion, appealed from the judgment of the third of May, and gave bond, both appeals being made returnable to the ensuing June term of this court.

The administrator, appellee, moves to dismiss the appeal, on the ground that the judgment was rendered and signed at the May term, and the appeal could not be taken by motion at the June term. Referring to his motion, which is applicable only to the judgment of the third of May, and in the event that it be maintained, he pleads that judgment as *res adjudicata*, and this is followed by an answer to the appeal praying an amendment of the judgment in several important particulars.

The proceedings in this case are irregular and improper, and we think it not amiss to call the attention of the parish judges to what we consider the correct practice in such cases.

When the representative of a succession files an account he is plaintiff. The burden is on him to prove and establish the correctness of the account, and it can not be homologated without such proof. If no opposition is made, the proof is introduced, and the whole proceeding is *ex parte*, just as in ordinary cases where judgment by default has been taken, and is to be confirmed. Where opposition is made, whether by one person or by several persons separately, or by a number of persons who unite, all the oppositions constitute so many answers or pleas to the same suit and demand, and they must all be tried as one case, and one judgment must be rendered. That judgment will pass upon and dispose of all the oppositions and the account; it will correct and amend the account so far as the oppositions are maintained, and, as thus corrected and amended, will approve and homologate it. Or, if the oppositions are not maintained in whole or in part, the account will be homologated so far as the several items are proven and established to the satisfaction of the court.

It was improper for the court in this case—it will be irregular and improper in any similar case—to take up and try the opposition as a separate case, pronounce a judgment disposing of the opposition, and, at a subsequent term, or at the same term, to render another judgment homologating the account.

The motion to dismiss can not prevail. The judge of the parish court treated the judgment of third of May as interlocutory, and the final judgment homologating the account was based upon that judgment, which, in fact, disposed of the whole case. The appeal from the judgment of homologation brought up the entire case, and the other appeal was not necessary, nor can it in any manner prejudice the rights of opponent. The first appeal in May was premature, and it was evidently taken merely as a precautionary measure. The appeal from the judgment of homologation was in all respects regular, and the only irregularity in the appeal at the June term from the judgment of the third of May is that it was taken by motion instead of by petition and citation. The whole object of citation is to bring the appellee into court; and if he appears for any other purpose than merely to move to dismiss the appeal, that object is fully accomplished. The answer to the appeal cures the want of citation, and the cause must be heard and determined on the merits.

And here we take occasion to say that the motion to dismiss ought, regularly, to be determined before an answer to the appeal is filed. The limited duration of the terms of this court in the country districts makes it necessary to hear the whole case on the motion and the merits at the same time. In order, therefore, to guard against the waiver which logically and legally results from the filing of an answer, the proper practice is to reserve, at the beginning of the answer, the benefit of the motion, and to set out in the answer that it is to be used only in the event of the overruling of the motion.

The administrator reserved a bill of exceptions to the ruling of the parish judge admitting in evidence a notarial act of the twenty-seventh of December, 1853, by which Telesphor Landry sold and conveyed to Valcourt Veazey one hundred and sixty acres of land which, by act of eleventh July, 1853, he had sold and conveyed to Carmelite Blanchet. She joined in this act of the twenty-seventh of December, in which it is declared that the sale and conveyance to her of the eleventh of July were null and void. The act was clearly admissible. It was the best evidence that the conveyance had been made to the husband; but it in no manner created any new right in him, nor did it divest any right of the wife. The sale in July, during the marriage, did not make the land the separate property of the wife, and the sale of the twenty-seventh of December did not make it the separate property of the husband. Whether the title stands on the conveyance to the wife of the eleventh of July, which she afterward declared to be null and void, or on the conveyance to the husband of the twenty-seventh of December, the property belonged to the community, and the community was the debtor of the wife for so much of her separate means as was used in paying the price.

Succession of Carmelite Planchet.

The inventory shows slaves valued at \$4100, lands valued at \$4600, a note for \$300, silver and gold coin \$418 30, Confederate money, available because used in paying Confederate tax of equal amount, \$112, and movable effects which were sold for \$7056 67. The slaves, of course, were of no value, and the lands have not been sold. The proof is clear that three hundred acres of the land and the slaves belonged to the wife at the time of the marriage, and that one hundred and sixty acres of the land belonged to the community. Part of the movables sold belonged to the community, and part to the wife alone.

It was proven that the means of the wife to the extent of five hundred dollars were used in paying for the one hundred and sixty acres of land belonging to the community; and that the wife sold a tract of land in December, 1858, to Onézime Trahan for twelve hundred dollars, cash, which she gave to her husband to keep for her. It does not appear what became of this money; but there is nothing tending to show that the husband used it, either for his own purposes or for the benefit of the community. Both husband and wife were industrious and economical, and he acquired no property, nor does any thing indicate any expenses of living beyond the income from her loom, the daily sales of vegetables from the garden, the crops of cotton and corn made by the labor of the slaves and of the husband, and occasional sales of cattle. We agree with the parish judge that the proof does not suffice to charge the community with this sum.

In June, 1865, the administrator filed what he called a tableau, which was, in fact, merely a statement of debts and charges, without any reference to the assets. The items foot up \$1440 22; or, filling a blank with amount of Guegnon's bill for printing, \$270 40, the amount would be \$1710 62. None of these items are debts of the community, except the physician's bill, eighty dollars, druggist's account, twenty-eight dollars, and Confederate tax, \$112.

The account or tableau filed in October, 1874, begins with debts as per former tableau, \$1710 63; and subsequent charges, including \$300 retained by the administrator for future charges, foot up \$3931 72, though when the deductions are made, preparatory to a distribution, this amount is set down at \$3971 72, and the balance for distribution is only \$2438 36.

Of all the items charged in this account, we find none which bear upon the property of the community, except such portion of the taxes paid as were levied on the one hundred and sixty acres of land belonging to the community. The property taxed was four hundred and sixty acres of land; and the entire amount charged is \$318 10, which gives for the one hundred and sixty acres, \$108 90.

The judge of the parish court found that of the movables sold by the administrator, objects which brought \$2498 28 had been identified and

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proven to have belonged to Carmelite Blanchet at the time of the marriage; and he decided that this amount should be deducted from the \$7056 67, and that the remainder belonged to the community. We agree with him in this, and shall affirm the judgment to that effect.

He also decided that the community was to be charged with five hundred dollars, paid on account of the price of the one hundred and sixty acres of land, and we find this correct, and shall affirm the judgment to that effect.

He also decided that the one hundred and sixty acres of land, the money on hand, and the note for three hundred dollars belonged to the community; and that the community was not chargeable with the twelve hundred dollars, price of land sold to Trahan by the wife in December, 1853; and we find the judgment correct, and shall affirm it to this extent, also.

The parish judge also rejected certain items in the account, and decided that the whole amount allowed was a proper charge against the community. In this we think he erred; and, as we are compelled to remand the case, we shall reverse his judgment, except so far as indicated above.

We have earnestly desired to render a final decision in this case, and to close this prolonged litigation, but it is not possible for us to do justice to the parties with the proofs in the record.

By law, at the death of the wife, the husband became absolute owner of one half the effects and property of the community, and usufructuary for life of the remainder. The community owed no debts, except for the medical and drug bills \$108, Confederate tax \$112, and \$500 due the succession of the wife. There was a sufficiency of Confederate money in the house to pay this tax, and it was used for that purpose; and the \$418 30 in gold and silver coin would have paid the medical and drug bills, and have left ample means to defray the funeral expenses.

So far as the community property was concerned, the husband was in possession of right, as head of the community, and the heirs were not entitled to any part of it, except the one half of the residuum after paying the small amount of community debts; and this half they could not have claimed during the life of the husband, the legal usufructuary.

We find the charges in the accounts filed by the administrator most extraordinary. The succession owed nothing but for funeral expenses, and the property was sold on a credit of one, two, and three years. Dissecting the accounts, we find charged in them for attorney's fees \$848 75, for commissions for collecting \$154 58, printing bills \$270 40, clerk's fees \$219 90, recorder's \$132 50, administrator's commissions \$272 94, keepers of the property and guardian of the seals \$374, making \$2273 07 of charges, without the slightest necessity or justification. We can not

Succession of Carmelite Planchet.

allow such wrongs to pass, with the apparent approbation of silence; and we are somewhat surprised to find that the opponent was allowed \$320 as keeper of the seals for one hundred and sixty days.

It was the right, and it was the duty of the husband to have paid the debts of the community, to have had an inventory taken, and to have retained the entire community property in his possession as owner of one half, as usufructuary of the other half, securing to the heirs of his wife their half at the expiration of the usufruct, in the manner pointed out in the Code.

This is no longer possible, except with respect to the one hundred and sixty acres of land, purchased of Telesphor Landry, on the twenty-seventh of December, 1853, which the opponent is entitled to take and hold and use, one half as owner, the other half as usufructuary.

With respect to the movables, all that can be done is to ascertain what should be reasonably deducted for the expense of selling them, and to charge against the community the community's share of these expenses, and to have the remainder paid over to the opponent, one half as owner, the other half as usufructuary; and for this latter half he will give security as required by the Code; or, failing to do this, the money must be put out, either with the consent of the heirs or by the authority of the judge of the parish court, at interest, and secured; the interest to be paid annually to the usufructuary, and the capital to be paid to the heirs or their legal representatives at the expiration of the usufruct.

The administrator must be required to make a new account, in which he will deduct from the sales, say the \$7056 67, the \$2498 28, which belongs to the succession of the wife. To the balance he will add the \$300 note of Frank, and the \$418 30 in coin. This sum will represent the gross amount of movables belonging to the community. From this sum he will be allowed to deduct such part of the expense of selling the movables as should be borne by the community; that is, where the whole expense of selling these effects is ascertained, it will be apportioned between the community owning \$4558 39, and the succession of the wife owning \$2498 28 of these effects. There will also be deducted the \$500 paid out of the wife's means for the one hundred and sixty acres of land, \$108 for medical and drug bills, and \$108 90 for taxes chargeable to the community property. The \$112 Confederate money, and \$112 Confederate tax, will be omitted, because the one extinguishes the other. When the amount is thus ascertained, the one half will be paid to Valcourt Veazey as owner, and the other half be delivered to him as usufructuary in the manner already stated.

The succession of Carmelite Blanchet will consist of the three hundred acres of land owned by her at the date of the marriage, the \$2498 28, her share of the movables sold, and the \$500 due to her by

the community, as just stated. Her half of the community will also be part of her succession, but it can not be administered or taken possession of by the heirs until the termination of the usufruct of Valcourt Veazey.

The administrator will account to the heirs for the effects of the succession, and the costs of administration, except the part of the expenses of selling, to be borne by the community, as above stated, will be chargeable to the succession alone.

It is therefore ordered, adjudged, and decreed that so much of the judgment appealed from as fixes the interest of the succession in the movables sold at \$2498 28, and recognizes the right of the community to the remainder, so much of said judgment as awards to the community the other personal and movable property, and the one hundred and sixty acres of land purchased during the marriage, and so much of said judgment as charges the community with the \$500 paid for the one hundred and sixty acres of land, and so much of said judgment as declares the community not liable for the \$1200, price of land sold by Carmelite Blanchet to Onézime Trahan, be and the same is hereby affirmed; that the said judgment be in all other respects avoided and reversed; that the cause be remanded for further proceedings as herein directed, and according to law; and that the costs of the court below and of this appeal be borne by the succession of Carmelite Blanchet.

29	526
46	370

29	526
49	179

29	526
123	156
128	187

No. 882.

ELIZABETH GIBBS ET AL. VS. JOSEPH A. LUM & Co.

A minor can not sue his tutor for what may be due him by the latter, nor sue to subject to his claims his tutor's property, during the existence of the tutorship. An heir who has attained majority can not subject any part of his tutor's property to the legal mortgage he may have on it, until he has first obtained a judgment of liquidation and settlement of his claims against the tutor.

The probate, and not the district court of the parish, has jurisdiction of suits by heirs against their tutors for settlement of tutorship affairs.

A PPEAL from the Eighth Judicial District Court, parish of St. Landry. *Morgan, J.*

Martel & Hudspeth, for plaintiffs and appellees.

Lewis & Brother, for defendants.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

MORGAN, J. An appeal was granted in this case on motion of defend-

Elizabeth Gibbs vs. Lum & Co.

ants, upon their furnishing "bond in the sum of one hundred and fifty dollars if for a devolutive appeal, and according to law if suspensive."

Motion is made to dismiss the appeal on the ground that the bond furnished is not such a bond as the law requires.

The bond is as follows:

"Know all men by these presents that we, ———, as principal, and Thomas H. Lewis, as security, are held and firmly bound unto ———, clerk of the district court in and for the parish of St. Landry, his heirs, executors, administrators or successors, in the sum of ——— dollars, for the payment whereof we bind ourselves, our heirs, executors, and administrators firmly by these presents.

"Dated on the twentieth day of February, 1875."

"Whereas, the above-bounden ——— appeal from a certain final judgment rendered against them in the district court in and for the parish of St. Landry, in favor of ———, in suit No. 12,262 of the docket of said court, entitled 'Elizabeth Gibbs, in her own right, et al. vs. J. A. Lum & Co.,' now, therefore, the condition of the above obligation is such that if the said ——— shall prosecute this ——— appeal and shall satisfy whatever judgment may be rendered against ———, or if the same shall be satisfied by the proceeds of the sale of ——— estate, real or personal; if ——— be cast in the appeal, then in that case the above obligation to be null and void, otherwise the said security shall be liable in ——— place.

"Clerk's office, parish of St. Landry.

"(Signed)

THOMAS H. LEWIS,

"Attorney in fact for J. A. Lum & Co.

"(Signed)

THOMAS H. LEWIS, Security."

The judgment was signed on the twentieth of February, and the bond was given on the same day. It must be considered with reference to the order of appeal, and must be taken as a bond for a suspensive appeal.

The motion to dismiss is therefore denied.

ON THE MERITS.

The opinion of the court was delivered by

MORGAN, J. Joseph Gibbs, Sr., owed Robert Henderson fifteen hundred dollars. To secure this indebtedness, Gibbs, on the twelfth of February, 1857, mortgaged a certain piece of property situated in the town of Opelousas. Robert Henderson died. His estate was inherited by his father, William Henderson. Forming part of his inheritance was the above-named indebtedness.

William Henderson died. He left to the minor children of Joseph Gibbs and to his wife, Bridget M. Carroll, the debt due by Joseph Gibbs. He appointed Joseph Gibbs his executor.

Mrs. Gibbs died on the twenty-second of February, 1864, leaving two minor children. She was in community with her husband. Her estate consisted in her interest in the community which existed between her husband and herself. The community owed no debts. On the second of February, 1866, Joseph Gibbs was appointed natural tutor to his minor children. As natural tutor he retained in his possession the property which composed the community which existed between himself and his wife and administered the same.

An abstract of the inventory of his wife's property was recorded in the mortgage record of the parish of St. Landry, the parish of domicile, prior to the first of January, 1870, to wit: on the ninth of September, 1869.

William Gibbs died without issue prior to the death of his mother. Consequently, his estate went one half to his father and mother and one half to his brothers and sister.

The mortgage executed by Joseph Gibbs in favor of Robert Henderson on the twelfth of February, 1857, has never been reinscribed.

On the twelfth of June, 1857, Joseph Gibbs executed a note for one thousand dollars, payable twelve months after date, to J. A. Lum & Co. On August, 1, 1857, Gibbs, to secure payment of this note, mortgaged all his property, including that upon which the Henderson mortgage bore. In addition to the note for one thousand dollars, Lum & Co. held his note for \$172 35, dated June 1, 1858, payable on demand. This note was not secured by mortgage.

On the nineteenth of January, 1866, Lum & Co. instituted suit on these notes, and prayed for a foreclosure of the mortgage. Gibbs confessed judgment. The judgment was recorded on the first of March, 1867.

On the twenty-ninth of July, 1872, execution issued. Under the execution the sheriff seized and offered for sale the property which had been mortgaged to Henderson. He also seized and offered for sale the property which belonged to the community which had existed between Jos. Gibbs and his wife.

Elizabeth Gibbs, in her own right, she being now a major, and Jos. Gibbs, tutor to Joseph Gibbs, Jr., filed a third opposition, in which they claim the proceeds of the property then about to be sold, to the amount of \$3625, with interest on \$1500 from July 12, 1856, at eight per cent per annum, and with interest at five per cent per annum on \$2125 from the twenty-second of February, 1864, as belonging to them.

Their opposition is based upon the facts above set forth.

At the first offering the property was not sold. At the second adjudication it was sold on a twelve-months bond for \$2350.

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Lum & Co., the defendants herein, pleaded—

First—That plaintiffs have no claim on the property seized. They admit that they once had a conventional mortgage on a part of it (that portion which was mortgaged to Henderson), but they say that this mortgage was not reinscribed until the first of March, 1867, and that it is therefore prescribed.

Second—That the property of Mrs. Gibbs was in the possession of Joseph Gibbs at the time it was seized, and that the recording of the abstract of the inventory of the estate left by Mrs. Gibbs conferred no rights upon Gibbs's property.

After answering, Lum & Co. excepted to the petition, because "Joseph Gibbs, tutor, has never rendered an account of the tutorship, and that until his account was rendered the mortgage claim of plaintiffs, if any, could not be ascertained." This exception was cumulated and tried with the merits.

Then Elizabeth Gibbs amended her petition, pleading that Lum & Co.'s claim was prescribed at the time they instituted suit, but that Gibbs, with intent to defraud her and her co-heir, in collusion with Lum & Co., confessed judgment; that at the time the judgment was confessed she was a minor; and that her interests could not be prejudiced by the illegal act of her tutor.

R. H. Littell, under-tutor to the minor, Joseph Gibbs, intervened and set up the same plea.

To both these last appearances Lum & Co. excepted upon the grounds:

First—That their judgment could not be attacked collaterally; and

Second—That plaintiff and intervenor, claiming proceeds of a sale in execution of the defendants' judgment, are precluded from contesting the regularity and validity of the sale in any way whatever.

The exception was overruled, and both amendment and intervention allowed.

There was judgment sustaining the plaintiffs' opposition in so far as related to their claim for fifteen hundred dollars on the Henderson mortgage, less one fourth of the share of the deceased minor.

There was error in the ruling of the judge on the exceptions to the amendment and the intervention. A judgment can not be attacked collaterally. Neither can a party claim the proceeds of a sale resulting from a judgment and at the same time say the judgment is a nullity. We are thus spared the necessity of inquiring as to the verity of the charges made by the children that their father has conspired and colluded with a stranger to defraud them of their rights. The debt due by Joseph Gibbs to Robert Henderson, contracted during his marriage, was a community debt; so was the debt due by Gibbs to Lum & Co.

The donation of the Henderson debt to Gibbs's children placed their

father and mother in the same position toward them that they were in toward Henderson. In other words, it was the debt to Henderson due to Gibbs's children. In this view it must be regarded in the same light that it would have been if the donation had been made of a debt due by a third person, secured by mortgage; and the same rule would apply with regard to the prescription of the mortgage. Understand that we are treating of a conventional mortgage, not debt. The debt may exist, and the mortgage be perempted. There is no difference between a conventional mortgage in favor of a minor and a conventional mortgage in favor of a major. Both are governed by the same rules, and both are prescribed by the same law. A mortgage, not reinscribed, held by a major, is prescribed in ten years. It is prescribed against a minor in the same time.

The mortgage granted to Henderson, through whom the plaintiffs claim, was recorded on the tenth of January, 1857. It has never been reinscribed. This suit was instituted in September, 1872. At that time, under the conclusion expressed above, the mortgage was perempted.

Lum's mortgage was recorded in August, 1857. Judgment was rendered upon it on the first of March, 1867. The judgment was recorded. From the date of the recording of the judgment it became a judicial mortgage. When execution issued the original mortgage was perempted. But the judicial mortgage took the place of the conventional mortgage, and the judicial mortgage was in force when the *fieri facias* issued. But the opponents contend that when the judgment was rendered the note which was secured by mortgage, and the one which was not, were prescribed, and that as the notes were prescribed, therefore no judgment should have been rendered upon them. If prescription had been invoked, perhaps it would have been fatal to the plaintiffs' claim. Prescription is a personal plea. It may be waived, expressly or tacitly. Here there was a confession of judgment. It was, therefore, necessarily waived. It is, however, contended that the waiver could not be made to the prejudice of the rights of third parties. In the first place, no rights of third parties were prejudiced, for the third parties here were the representatives of Henderson, and Henderson's mortgage was perempted before the confession of judgment was given. In the next place, the defendant in that suit was authorized to waive prescription. The debt for which he was sued was a community debt. As such he controlled it. The precise point was lately decided in a case recently decided in New Orleans, the title of which now escapes our memory.

The conclusion to which we have come upon the merits renders it unnecessary that we should express any opinion as to the exception which the defendant took to the proceeding.

It is therefore ordered, adjudged, and decreed that the judgment of

the district court be avoided, annulled, and reversed, and that the plaintiffs' third opposition be dismissed, the costs in both courts to be paid by them.

ON REHEARING.

The opinion of the court was delivered by

SPENCER, J. Our predecessors granted a rehearing in this cause, at the June term of 1876, on application of plaintiffs.

We do not think the rehearing extends to the decision on the motion to dismiss. But, if it does, we think that it is correct, and ought not to be disturbed.

Most of the facts material to the case are stated in the former opinion of this court, and need not be again recapitulated.

The defendants excepted to the third opposition of plaintiffs on the ground that the opponents could not proceed to enforce their claims and mortgages against their tutor or his property until the amounts due them had been ascertained and liquidated on final account of the tutorship. It seems that one of the opponents, Elizabeth Gibbs, had attained majority, but the other, Joseph Gibbs, Jr., was a minor still at the date of filing this suit. It is well settled, and, indeed, elementary, that a minor can not, *pending the tutorship*, execute his claims against his tutor; that such demands become executory only at the expiration of the tutorship. Being under tutorship, any moneys recovered would of necessity go immediately back into the hands of the tutor, who would thus as it were have money taken out of one pocket and immediately put back into another. He would be enforcing the collection of a debt from himself, and the very act of paying the debt would, instead of extinguishing it, give it life anew.

This court well said in 12 An. 361: "It may well happen that when the minors attain majority the tutor shall owe them nothing; that all may have been consumed in payment of debts, expenses of education, etc.; or it may be that the minor may die before attaining majority, and that the whole, or a part of the indebtedness of the tutor, may be thus extinguished by confession.

"When the minors shall have attained the age of majority, or shall be emancipated by marriage, or when the tutrix shall be from any other cause compelled to account, and the claims of her children against her shall have been liquidated, and the balance in their favor ascertained, the recourse of the children will be, first, against the property then in possession of their mother and tutrix, and it may be that she will have property sufficient to satisfy their claims. But if not, then the minors will

have their recourse against the third possessors of property alienated by their mother since the date of her appointment as tutrix."

To allow the claims of the minor to be executed against his tutor's property, pending the tutorship, would be to open the door to great frauds on minors, and put it in the power of the tutor to destroy the security which the law so zealously preserves for the minor's benefit; for all the tutor would have to do would be to enforce or have enforced against himself the claims of his ward, and then pocket the proceeds of the sale of his own property so sold under the minor's claims.

These views are, we think, conclusive against the right of the minor, Joseph Gibbs, Jr., to intervene and claim any part of the proceeds of the property sold in this case.

As to Elizabeth, having attained her majority, she stands in a somewhat different position. But we think that until she has, by proper proceeding in the probate court, ascertained and liquidated, contradictorily with her tutor, her rights and claims against him, she is not in position to enforce them. It is manifest that liquidation can not be had in this case before the district court, because the proper parties are not before it. Her demands must be established against her tutor and father. He must, therefore, be a party defendant, and there must be proper pleadings to serve as the basis of a judgment. In this case *her tutor* is not a party to this suit. The tutor of Joseph Gibbs, Jr., or rather Joseph Gibbs, Jr., by *his* tutor, is a co-plaintiff with Elizabeth. There is, and can manifestly be, no proper issue for settling her claims against her tutor. Again, the district court could not take jurisdiction of a demand by a minor against his tutor for liquidation of the affairs of the tutorship. In the case before us, it appears in evidence that Elizabeth Gibbs has commenced in the parish court, and that there is now pending therein, a suit against her tutor for settlement of his account of tutorship. That court is certainly the proper forum for such a contest, as it has exclusive probate jurisdiction.

The law manifestly did not vest both the district and parish courts with such jurisdiction, and such an interpretation would lead to endless confusion and conflicts of jurisdiction, since in this very case, where the district court has adjudged plaintiffs to be large creditors of their tutor, the parish court may render a very different judgment. We, therefore, think that so far as relates to any claims of opponents, under their legal mortgage, their demands should be dismissed, reserving to them their right to pursue hereafter such recourse on the property sold as the law permits. It is, we think, indisputable that they have preserved by proper registry a legal mortgage upon the property of their tutor to the extent, at least, of \$4250.

The law prior to January 1, 1870, gave them a legal tacit mortgage

without registry. The act of 1869 provided that this legal mortgage could be preserved by recording "an abstract of the inventory," and that its recordation "shall operate a mortgage on all present and future property of the tutors, *for all their acts*, until they are relieved," etc.

The conventional mortgage of Lum & Co. having perempted, their judicial mortgage is inferior to this legal mortgage, and a sale under the Lum debt did not divest the minors' mortgage, and the property sold is still liable for such amount as on final settlement may be due them.

So far as concerns the opponents' claim under the conventional mortgage to Henderson, their rights are clearly lost for want of reinscription; but it is manifest that, as this loss is the direct result of the negligence or fraud of their tutor, they are his creditors for its value, and that their claim in this regard is protected and preserved by their legal mortgage, which secures them against "all acts" of maladministration of their tutor. It will, therefore, be a proper charge against the tutor in the settlement of accounts, but can not be enforced now, and in this case, as a conventional mortgage right.

It is proper here to remark that, the opponents' rights not being affected by the sale under the Lum judgment, we do not see that they have any interest in contesting it. But if they had, we do not think it could be successfully done. A debt barred by prescription still exists until it is pleaded; and even afterward there is always a natural obligation remaining which is a good consideration for a new promise to pay. It is not necessary for us, under the view we have taken, nor, indeed, under the facts of this case, to express any opinion upon the proposition announced by our predecessors in this case, that the surviving husband may after the death of his wife and dissolution of the community revive by acknowledgment a debt already prescribed, so as to make it exigible upon the assets of the community, including the wife's share thereof, since, as we understand the record, only the husband's interest in the community property was sold. And whether so or not, the minors, not being parties to the sale, would not be bound by it if their share of the community was not legally liable, upon which, as stated, we express no opinion.

It suffices for the purposes of this case, that the Lum judgment was valid against Joseph Gibbs, Sr., and this seems to be conceded.

It is therefore ordered, adjudged, and decreed that the judgment of this court heretofore rendered be so amended as to reserve any rights opponents may have under their legal mortgage to hereafter pursue by hypothecary action the property sold under execution in case of J. A. Lum & Co. vs. Joseph Gibbs, Sr., and that in other respects said decree remain undisturbed.

Mrs. Nancy M. Fraser vs. Zylicz.

No. 951.

MRS. NANCY M. FRASER, WIFE, ETC., VS. PAUL ZYLICZ.

The tutor of minors is a proper party to sue for the removal of an under-tutor.

Where the tutor of minors, who has been appointed by the probate court of one parish, removes with the minors and resides in *another* parish, the probate court of the latter parish will have jurisdiction of a suit brought by him to remove an under-tutor.

Property of minors, *unless sold to pay the debts of the succession*, must bring the full amount of its appraisal. Otherwise, its sale will be annulled.

Actions to set aside public sales on account of any informalities connected with them, are prescribed, as to *all* persons, in five years.

A PPEAL from the Third Judicial District Court, parish of St. Mary. *Train, J.*

Fred Gates, for plaintiff and appellant.

A. L. Tucker and *D. Caffrey*, for defendant.

The opinion of the court was delivered by

SPENCER, J. The material facts of this case are as follows:

Nancy M. Theall, wife of Malcom A. Fraser, died in 1851 in St. Mary parish, where they resided, leaving four children, issue of the marriage, to wit: plaintiff and three others.

The husband, Fraser, qualified as natural tutor of his minor children, and James Lacey, of St. Mary, was appointed the under-tutor by the probate court of said parish. An administrator was appointed to the estate of the deceased wife, and, after settlement, the balance, some five thousand dollars, in his hands was paid over to the tutor. There remained also property of the wife's paraphernal estate, consisting of a house and lot in the town of Franklin, in said parish, and several slaves. About 1853 the tutor and father removed to and became domiciliated in the city of New Orleans, taking his minor children with him.

In December, 1854, the tutor applied to the Second District Court of Orleans to convene a family meeting to advise as to the necessity and propriety of selling the said lot and slaves. The meeting was ordered and the under-tutor notified to attend. He failed and neglected to do so, and declined to resign. Thereupon the tutor instituted suit in the said Second District Court to remove him from office. After having been cited and making default, he was destituted by decree of said court.

Thereupon another under-tutor was appointed. The family meeting convened and advised and recommended the sale as necessary to educate and maintain the minors. Their deliberations were duly homologated and a decree rendered directing the sale as advised. A commission issued to the sheriff of St. Mary, and the property, after due and legal advertisement, was sold. It appears by the inventory taken in 1851 that this house and lot were appraised at twelve hundred dollars and

29	534
44	49
29	534
48	800
49	181
29	534
113	196
29	534
120	43

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the slaves at twenty-six hundred dollars. At the sale by the sheriff the house and lot were adjudicated to one Stevens at eight hundred dollars, and the slaves (omitting one not sold) brought \$3166. This sale was made on the ———, 1855.

The plaintiff sues to recover this house and lot, on the ground that the proceedings were illegal and void. She claims that she is sole owner, and entitled to recover for the reasons:

First—That the tutor was without capacity to stand in judgment for removal of the under-tutor.

Second—That the court of St. Mary alone had jurisdiction of a suit for his removal.

Third—That the minors' property could not be sold for less than its appraisement.

The defendant sets up various defenses, which it is not necessary to specify, and calls in warranty his vendor, who in turn calls his vendor, etc. The main points of defense are that the proceedings by which the property was sold were regular; that the decree of sale by the Second District Court, having jurisdiction, protected the purchaser against all irregularities anterior to judgment and prescription.

First—As to the capacity of the tutor to sue for the removal of the under-tutor: The plaintiff contends that that suit could only be brought by a curator *ad hoc*, appointed by the court, and cites 10 La. 82. That case simply decides that the uncles of a minor, as such, could not sue to destitute an under-tutor, as they did not represent the minor. Our Code is silent as to the person who shall bring such suit, but provides that any person knowing cause for the removal of tutors may give information to the judge, who may appoint a curator to bring the suit. It seems to us that the tutor, representing, above all others, the minor, is eminently a proper person to provoke the removal of the under-tutor who fails in his duty. Because a curator appointed by the judge may also do so is no argument against the right of the tutor. It is only an additional means provided by law to secure fidelity in its officers.

The second ground, that the probate court of St. Mary alone had jurisdiction to remove the under-tutor, is, we think, untenable. The under-tutorship is a mere accessory to the tutorship; and as it is not disputed that the Second District Court of New Orleans was seized of jurisdiction of the tutorship from the moment the natural tutor and his children became domiciliated there, it would seem that its jurisdiction extended to all of its incidents. Any other construction of the law would lead to infinite confusion. Article 1013 of the Code of Practice must be construed in connection with other provisions of the law, and is not mandatory in its terms. It says "tutors, etc., *may* be removed by the court of probates which appointed them." It has been held that

"the court of the minor's domicile must accept the under-tutor's resignation, and appoint a successor. So, the minor's domicile being attendant on the tutor's, when the latter, after appointment of an under-tutor, removes to another parish, to the judge of the latter must the under-tutor address his resignation." C. C. 289; 14 La. 478; 2 R. 418; 14 An. 565.

Besides, this objection as to the right of the tutor to sue to remove the under-tutor goes to matters anterior to judgment, and, as we hold that the Second District Court properly took jurisdiction, can not affect a purchaser under a decree of said court. It is well settled that a purchaser is not bound to look beyond such decree.

Third—The only irregularity or illegality subsequent to judgment that appears or is complained of is that the house and lot sold for less than its appraised value. The property sold was that of minors. Article 342 of the Civil Code declares that "the minor's property can not be sold for less than the amount of its appraisement." It does not appear that any other appraisement than that in the inventory of 1851 was ever made, and we must presume that that was the appraisement under which the sale took place. As we have seen, the property ordered to be sold brought in the aggregate more than its appraisement, but this particular house and lot only brought and was adjudicated for two thirds of its appraisement. Defendant insists that this is a substantial compliance with the law, and shows that the property was not sacrificed; and that this fact, coupled with the further fact that Trowbridge, one of the subsequent purchasers thereof, sold it some few years afterward for nine hundred dollars, justifies the inference that it brought all it was worth. We are aware that this court has held that the sale of a minor's property to pay the ancestors' debts may under certain circumstances be made for less than its appraisement; but we think the property in those cases was rather that of a succession than that of a minor, and that the law as laid down in articles 990, 991, and 992 of the Code of Practice, governing sales of succession property, received a most liberal interpretation in the cases where this court so held.

While, upon the doctrine of *stare decisis*, we would be loth to depart from the rule that succession property sold to pay debts may, on first offering, be sold for less than its appraisement, provided that the price brought be in fact its full value, though less than its appraisement, we are not disposed to extend the rule to property belonging exclusively and strictly to minors. We prefer to adhere to the letter of the law, that it can not be legally sold for less than its appraisement. C. C. 342, *et seq.*

But the defendant interposes the plea of prescription to this action to annul the sheriff's sale of this property in 1855.

By act of 1835, re-enacted in 1855, and now incorporated in the Revised Civil Code as article 3543, it is provided that "all informalities

Mrs. Nancy M. Fraser vs. Zylitz.

connected with or growing out of any public sale, made by any person authorized to sell at public auction, shall be prescribed against by those claiming under such sale after the lapse of five years from the time of making it, whether against minors, married women, or interdicted persons." It is manifest that the adjudication of a minor's property for less than its appraisement is not absolutely null, but only annullable. The adjudication of it by the sheriff for less than its appraisement is an informality and illegality of the sale, like that made without advertisement, or with an insufficient advertisement, or without appraisement, and the like. We think the defendant is protected by this prescription, as it runs against minors, and more than twenty years had elapsed between the day of the sale and the institution of this suit.

As we have stated, this sale was made on the application of the plaintiff's tutor, recommended by a family meeting, and approved and ordered by a competent court, for the purpose of providing means of educating and maintaining her and the other minor children. Are we to *presume* that all this was a fraud? that, after receiving the proceeds of this sale, plaintiff's father, dishonestly and in disregard of his official oath and duty, diverted these funds from the objects to which they were destined and converted them to his own use? If not, and if the presumption is in favor of his having dealt honestly with his wards and fulfilled his duties, then, in the absence of contrary proof, we must presume that the money proceeding from said sale inured to plaintiff's benefit, and she could not recover without a previous restitution of the price.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed with costs of both courts.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

AT

MONROE.

JULY, 1877.

JUDGES OF THE COURT:

HON. T. C. MANNING, *Chief Justice.*

HON. R. H. MARR,

HON. A. DEBLANC,

HON. W. B. EGAN,

HON. W. B. SPENCER,

} *Associate Justices.*

No. 657.

MCLEAR & KENDALL VS. SUCCESSION OF J. L. HUNSICKER.

A motion to strike out the answers of a witness, as irrelevant, or not responsive, should be passed on by the court separately, as a preliminary matter, and not referred to the merits.

The answers of witnesses, if practicable, should amount to mere admissions, or denials. Every thing additional will be stricken out, except such statements of fact as are explanatory of, and "closely linked" with the questions propounded.

In the absence of proof to the contrary, it will be presumed that notaries of other States have no greater powers than are possessed by those of this State.

When extracts from commercial books are ordered by a court, they must be *literal transcripts* from the books, not accounts based on the books.

A PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J.*

Franklin Garrett, for plaintiffs and appellees.

Morrison & Farmer, for defendant.

ON REHEARING.

The opinion of the court was delivered by

MANNING, C. J. This suit is upon four promissory notes. The defense is payment, to sustain which the defendant propounded interrogatories to the plaintiffs.

The first is—"Examine the fourteen letters and two receipts hereto annexed. Was not each one of said letters and receipts written by your firm or by direction of your firm?" The answer of each plaintiff covers fifteen pages of the transcript. It commences: "Each of the fourteen letters and two receipts was written by the firm of McLear & Kendall or by their direction, under the following circumstances:" and then follows a narrative of all the business transactions between plaintiffs and defendant's intestate, commencing two years before the first purchase that is included in this suit. All the facts, events, and circumstances are recited with amazing amplitude of detail; rules of law governing the imputation of payments are announced, and copious quotations from the correspondence of the parties are inserted. It is, in fact, such a statement of their case as is appropriately placed in what we call a "brief," or written argument on the facts and the law.

The defendant moved to strike out the whole answer, save only the first two lines, ending with the word "direction," on the ground that the answer is not responsive to the interrogatory, and this motion was referred to the merits. This was improper. The motion was a preliminary to the trial, and should have been heard and decided before that began. The defendant's reserved bill requires us to review the further question whether that part of the answer to which she objected should have been stricken out.

In answering a question, the interrogated party must simply confess or deny the fact, but may nevertheless state some other facts tending to his defense, provided they be closely linked to the fact on which he has been questioned. Code of Practice, art. 353. The scope and meaning of this descriptive phrase "closely linked," as defining the relation which the facts stated bear to the fact about which the party is interrogated has received numerous adjudications. *Jocum vs. Roy*, 3 Martin, 410; *Wells vs. Hickman*, 6 Rob. 2; *Baker vs. Garlick*, 9 Rob. 127; *Smith vs. Richardson*, 11 Rob. 518; *Williams vs. Vance*, 2 Annual, 910; *Hoover vs. Miller*, 6 Annual, 205; *Owen vs. Brown*, 13 Annual, 201. If the answer states a distinct and separate fact from that upon which the interrogatory is based, and not necessarily connected with it, or if he states a legal consequence following upon facts, the answers will be excluded, and, *a fortiori*, will the answer be stricken out where a series of acts, in no way connected with or linked to the manual signing of a paper, are detailed with an intent too obvious to be mistaken. The motion of the defendant should have been sustained.

Notwithstanding the expressions used by this court in ordering objectionable parts of answers to be "stricken out," the plaintiffs' counsel contends that it can not be done, but only that such objectionable parts may be disregarded. And he bases this upon another proposition—that

the answers to interrogatories on facts and articles form part of the record, and need not be offered in evidence. This last is indisputable, but it means that those answers only form part of the record which are held and received by the court as legal and proper answers. When this court uses and repeats the expression, that answers or parts of answers are ordered to be "stricken out," the meaning is that the clerk should not copy them in the transcript, even with lines drawn across them as was done here. And the plaintiffs anticipated this manner of executing the order of the court, as is apparent by their attaching the excluded answers to a bill of exceptions, taken to the refusal of the judge to permit them to offer those answers in evidence.

It is apparent that if the plaintiffs could not be permitted to go beyond the limits of a responsive answer to the interrogatory which probed their conscience, they could not use the excluded answers of themselves as original testimony, and the court properly excluded them. There is little excuse for a party, interrogated on facts and articles, now to go beyond, or to attempt to go beyond, a categorical answer, or the statement of facts closely linked with that about which he is asked. When this form of obtaining the statement of one's adversary in a suit at law was introduced in our practice but few persons had conceived, and still fewer would have approved, the innovation of permitting a party to testify in his own behalf. When a profound thinker first startled the legal profession with the enunciation of this as a proper rule to apply to the investigation of legal contestations, it was pronounced a heresy with exceptional unanimity. So rapid has been the progress of legal reform in that direction that not only were parties permitted to testify in our courts when both were alive and present, by the law of 1867, but even when the lips of one had been sealed by death, the law of the following year (Acts 1868, p. 269; Civil Code, art. 2260 as amended by new number 2281), permitted the surviving adversary to testify—an enlargement of the rule the sound policy of which may well be doubted, and which is at variance with the reason on which the rule is founded.

The plaintiffs had but to take their own testimony under commission, when they found their debtor was restricting their freedom of reply by binding them with the legal withes of a peculiar and technical kind of interrogatories.

The defendant now moved that the plaintiffs produce in court extracts from their books, or sworn copies of their accounts with him, and this was granted. A few days afterward the plaintiffs filed these extracts and copies, from which it appeared that the oath, by which they were verified, was administered by one Puhl, a notary public, who also signs as commissioner, and in the recital of his jurat states himself to be special commissioner appointed by the court of Ouachita to take the oath of plaintiffs.

There is neither order of the judge, designating him as special commissioner by name, nor commission addressed to him as such, and therefore his power to receive the oath would rest upon his official capacity as notary public. We must assume that notaries in Delaware could only do such official acts as notaries could do under our law, there being nothing shown to the contrary, and it was not until the present year that those officers were empowered to receive oaths or acknowledgments. Acts 1877, p. 10.

The defendant, treating the copies filed by plaintiffs as having no legal existence, by reason of their want of a legal affidavit, moved the court to take the statements of her own affidavit of what she expected to prove as confessed. Her affidavit had disclosed what she had expected to prove by the copies which she was calling for. The court refused her motion, and she complains.

The rule of law which permits a party to take his own averments and allegations *pro confessis* when his adversary is derelict in not complying with the order of court is made to prevent any delay or evasion of a compliance with that order. In this case the plaintiffs had complied with extraordinary celerity, and had furnished defendant with what purports to be the account of the parties, and the incapacity of the officer who administered the oath was the objection to it as a proper compliance with the order.

Another ground for the motion was that the papers filed by the plaintiffs were not extracts from their books, nor sworn copies thereof, but a statement of accounts. An examination of all of the accounts thus filed countenances this allegation, but does not substantiate it. The plaintiffs are not permitted to restate their account with the defendant, or to put it in the shape they think it ought to be, but they must comply with the order which calls for extracts from or copies of their books. It is the account as it appears on their books, with all the mistakes of their book-keeper, that is wanted, and that must be supplied. It is probable that the books will show that the cheque on Bethlehem bank for five hundred dollars was credited on the first-maturing note in this suit, as it ought to be, since the plaintiffs' letter distinctly imputes the payment then made to that note. The evidence in this record satisfies us that the plaintiffs are not entitled to the judgment awarded them in the lower court, and the last letter written by the deceased to his creditors equally shows that the judgment of our predecessors in favor of the defendant is not correct.

On the last day of April, 1873, Hunsicker wrote the plaintiffs: "I could not blame you for being angry with me for not lifting the notes you hold against me. I have tried in vain thus far to raise any money. I have offered heavy interest, but the money is not in the country. * * * I

own some fine property, there is no better in this place, but I could not to-day sell for half its value. I am under many obligations to you for waiting on me so long, and God knows that I would not swindle you out of one cent. If I die, you are bound to be paid. Yours is a debt that I will pay if I never pay any others."

This is not the language of a man who owes nothing to the person to whom he is writing, and it is only the fact that he owed nothing that could justify a judgment in his favor. He died three months afterward.

We shall remand the case. Our review of the rulings of the district judge will enable the court that shall hear the new trial to dispose properly of such issues, if they shall be raised again, and as the new transcript will contain nothing but the pleadings, process, and the testimony of that trial, with the orders and judgment and minutes of the court, or, in other words, will not be incumbered with the evidence in this record, we shall be able to arrive at a juster judgment than we can now pronounce.

It is therefore ordered, adjudged, and decreed that the decree heretofore rendered by this court, and the judgment of the lower court, are avoided and reversed, and the cause is remanded to the district court to be heard anew, and to be proceeded with according to law, the plaintiffs and appellees to pay costs of appeal.

No. 739.

THE STATE VS. JAMES ATKINSON.

Persons on trial for alleged crimes have a right to demand that *all* of the regular venire of jurors present, and not then engaged on other jury duty, shall be submitted to their acceptance, or rejection, before talesmen are resorted to for the formation of juries.

APPEAL from the Seventeenth Judicial District Court, parish of Natchitoches. *Pierson, J.*

W. P. Hall, District Attorney, for the State.

C. F. Dranguet and *J. F. Smith*, for defendant and appellant.

The opinion of the court was delivered by

MARR, J. The accused was indicted, tried, and convicted of assaulting R. W. Allison, by willfully shooting at him. Having been sentenced to imprisonment in the penitentiary, at hard labor, for one year, he has brought the case before us for review.

The only question for our consideration is that presented by the bill of exceptions as to the formation of the jury.

The case was reached late in the evening of the day on which it had

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110	514
29	543
123	611

been fixed for trial. Two juries were then out in cases in which verdicts had not been rendered, and there were, on those two juries, five only of the regular venire. The accused announced himself ready for trial, and the sheriff proceeded to call the jury. Four only of the venire answered, and the names in the box were exhausted. Thereupon the judge ordered the sheriff to summon twenty-six talesmen, to be in attendance the next morning at nine o'clock; and the court adjourned to that hour.

When the court met next morning, and the trial was resumed, the two juries that were out when the court adjourned the evening before had been discharged, and the five veniremen who had been on those two juries were present in court. The sheriff began to call the talesmen, in order to complete the jury, when the counsel for the accused objected, and moved the court to order the sheriff to call into the jury-box the five veniremen in question. The judge refused to do this, on the ground that the talesmen and the four regular jurors who had answered to their names constituted the lawful jury for the trial of the case, and not the rest of the regular panel, who had not answered; and he ordered the sheriff to call the talesmen. The jury was completed, being composed of one of the four veniremen, who had been called the evening before, and eleven men chosen from the talesmen, who had been summoned by order of the court.

The accused reserved his bill of exceptions; and, after a verdict of guilty, with a recommendation to the mercy of the court, he moved for a new trial, on the same ground, that the talesmen could not be resorted to until after the veniremen in court had been called.

The judge proceeded under the act of 1873, section ten, page 168, which is as follows:

"When the regular venire shall have been exhausted, and it is necessary to summon talesmen, it shall be competent for the district judge to determine how many shall be summoned, at what time the summons shall be returned, and from what part of the parish they shall be summoned; and he shall not be required, when, in his opinion, the public interests may suffer from so doing, to order the talesmen to be summoned from among the bystanders or persons in proximity to the court-house, but he shall have the discretion to order the talesmen from any part of the parish he may deem best."

The sheriff had called all the names in the box, and the regular venire had been exhausted. Obviously, it had become necessary to summon talesmen. It can not be questioned that the judge might have directed the sheriff to call the bystanders, those who were in the court-room and such persons as might have been outside in proximity to the court-house. Possibly, the jury might have been completed, and if it had been so completed, there can be no doubt it would have been legally formed. The

judge could not know when the two juries that were out might find verdicts and be in court; and he could rely on four only of the regular venire who had answered to their names. A due regard for the public interest, as well as for the right of the accused to a speedy trial, by an impartial jury, required the judge to order a sufficient number of talesmen to be summoned to secure the completion of the jury, and so to fix the time for the return of the summons as to enable the sheriff to have in attendance more suitable persons for that service than he would probably have found among the idle spectators in the court-room, or those who might be loitering about the court-yard.

If, at the opening of the court next morning, the two juries had still been out, it would have been the duty of the court to proceed to have the talesmen called and the jury completed. But the state of things which existed at the time of the adjournment the evening before had ceased to exist. The two juries had completed the service in which they were then engaged, and were ready for service as regular jurors for that term.

The act of 1873 evidently contemplates and intends that the venire summoned in accordance with its provisions shall, as far as it may be practicable, perform the entire jury duty of the term for which they are summoned.

After directing how the names of the persons to be summoned as jurors shall be drawn, section five declares that "the persons whose names have been so drawn *shall be the jury for the said court.*" It requires the list, so soon as completed, to be preserved in the clerk's office, "open to inspection," and to be published in at least three issues of the official journal, if one be published in the parish, or any other paper, or posted at the court-house door if there is no official journal or other paper published in the parish.

The object is, undoubtedly, to give all parties interested an opportunity to know who will compose the jury at the ensuing term, and to ascertain their fitness to serve in that capacity. Parties accused have the right to demand that they shall be tried by jurors selected from this list, if practicable, and that other persons, talesmen, shall not be resorted to until after the regular venire shall have been exhausted.

When the court met four of the venire had already been called and were in the jury-box, and five others, who were absent when the call was made, were present, not excused by the court, and not engaged in jury duty. It was the right of the accused to have all of the regular venire in attendance presented to him for acceptance or rejection; and as the five who had not answered the evening before were then in attendance, the regular venire had not been absolutely exhausted, and they should have been called first, and the talesmen should have been called only after all

State vs. Atkinson.

of the regular venire in attendance had been called and the list had been actually, absolutely exhausted.

The court need not wait, should not wait, when the names of the regular venire have once been called; but if, before the talesmen are called and the jury completed, members of the regular venire who were not present at the first calling come into court, they should be called, and the jury completed from them if practicable. Manifestly, the jury could not have been completed without calling the talesmen; but the accused was entitled to have as many of the venire on the jury as might be found qualified and should not be challenged. We see no reason to doubt that the talesmen were proper persons and suitable jurors; but we do not think it safe, in criminal cases, to compel the accused to submit to a trial by any other than a jury selected from the regular venire, where such a jury can be impaneled; and no right which the law has given to the citizen, no safeguard which has been provided for the protection of life, or liberty, or property should be disregarded by the judicial tribunals.

We think our learned brother of the court below erred in refusing to have the five veniremen called into the jury-box before resorting to the talesmen.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; that the verdict of the jury be set aside, and that the case be remanded to be proceeded with according to law.

No. 704.

G. M. BAYLY & POND vs. E. A. GIVENS, SR.

Article 326 of the Code of Practice which provides that if a defendant denies his signature of the instrument he is sued on, he shall not, if his signature is proven, be allowed to set up any other defense, only applies when the instrument sued on purports to be signed by *the defendant himself*. It does not apply when the instrument is signed by one assuming to be the *agent* of the defendant.

A PPEAL from the Eleventh Judicial District Court, parish of Lincoln. Trimble, J.

R. W. & R. Richardson, for plaintiffs and appellees.

Gaskins & Barksdale and J. S. Young, for defendant.

The opinion of the court was delivered by

MANNING, C. J. This suit is brought by the commercial firm of G. M. Bayly & Pond, of New Orleans, against E. A. Givens, Sr., of Lincoln parish, and is founded on a draft alleged to have been drawn by E. A. Givens, Sr., *per pro*. B. C. Alexander, on W. Morrison & Co., for \$2550, in

Bayly & Pond vs. Givens.

favor of B. C. Alexander, accepted by Morrison & Co., and indorsed B. C. Alexander, in blank, dated New Orleans, April 19, 1873, and due ten months after date. It is alleged by plaintiffs that they are the owners and holders of the draft, having acquired the same for a valuable consideration; that E. A. Givens, Sr., by his duly authorized agent, B. C. Alexander, executed the draft; that at maturity the draft was not paid, the drawees having no funds of the drawer in hand, and that demand and protest were waived with the knowledge of the drawer.

The defendant filed what he termed a peremptory exception and answer, in which he pleads that "had he drawn such draft as that sued on, or caused the same to be drawn, he was entitled, under the law, to notice of protest and dishonor," which he avers was not given. He then denies signing, or causing to be signed, the draft; denies that he authorized B. C. Alexander, or any one else, to sign the draft, either verbally or in writing. He alleges that Alexander never was authorized for such purpose; that the signature to the draft does not appear to be the genuine handwriting of B. C. Alexander, and he denies that Alexander ever signed it. Defendant avers that he never heard of the pretended execution of the draft till long after its maturity; that he has no knowledge of any cause or consideration for the same; that the draft is a forgery, and an attempt on the part of plaintiff and W. Morrison & Co. to extort money from him, defendant, illegally, unjustly, and fraudulently.

Defendant afterward filed an amended answer and prayer for a jury under oath.

On the trial the lower court refused to allow the defendant to offer evidence in support of any part of his defense except that of forgery, holding that the only issue was forgery or no forgery, and that under an express law the defendant whose signature shall have been proven after his having denied the same shall be barred from any other defense. Code of Practice, article 326. We think the judge misapplied that law. The Code of Practice prescribes that when the demand is founded upon an obligation, or an act under private signature, which is alleged to have been signed by the defendant, such defendant shall be bound in his answer to acknowledge expressly or to deny his signature. Code of Practice, article 324. Then follows that other provision that the defendant whose signature has been denied shall, upon its being proven, be barred from every other defense.

The reason, equally with the letter, of these articles of the Code, limits their application to cases where the signature of the defendant himself is the matter denied. The expression used is, an act "alleged to have been signed by the defendant," and it is *his* signature that he must acknowledge or deny. The article treats of the defendant *whose* signature has been denied by himself, and manifestly means the personal signature

Bayly & Pond vs. Givens.

of the party who is denying its genuineness. No man can honestly plead ignorance of his own signature, but he may well be ignorant of that of his agent. It is not reasonable to suppose that the law would require a man to know the signature of his agent with the absolute certainty that he knows his own. Men often have agents whom they have never seen write, and whose signatures they have never seen. The provision of the article is punitory in its character, and it would be contrary to all rules of interpretation to extend it by implication or analogy to cases not clearly within its terms. This view is strengthened by and is in harmony with the similar provision of the Civil Code that the person against whom an act under private signature is produced is obliged formally to avow or disavow his signature, but the heirs or assigns may simply declare that they know not the handwriting or signature of the person they represent. Article 2240 (new No. 2244).

These views are conformed to what was said by this court in 1846 at this place, *i. e.*, that the penalty established by these articles is imposed by its terms upon the party who denies *his* signature, and should not be extended by implication. *Bradford vs. Cooper*, 1 Annual, 325.

Justice to both parties requires the case to be remanded.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court is avoided and reversed, and that this cause be remanded to be proceeded with in accordance with law and the views herein expressed, and that appellees pay the costs of appeal.

No. 741.

MECHANICS' BUILDING ASSOCIATION VS. C. L. FERGUSON. J. B. PUGH,
THIRD OPPONENT.

The pledge or sale of a negotiable instrument before its maturity carries with it all the liens by which the instrument is secured, and by such sale, or pledge, the transferee divests himself of all power to affect the liens which secure the instrument.

The unauthorized cancellation of a mortgage by the recorder of mortgages, can not impair any rights of the owner of the mortgage.

APPPEAL from the Tenth Judicial District Court, parish of Caddo.
Looney, J.

W. H. Wise, for plaintiff and appellee.

J. B. Slattery, for defendant.

T. Alexander and *E. B. Herndon*, for third opponent.

The opinion of the court was delivered by

MANNING, C. J. In November, 1874, one Frank borrowed a sum of money from J. B. Pugh, and executed his notes for its payment, and at

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44 154
29 548
47 809

29 548
117 889

Mechanics' Building Association vs. Ferguson.

the same time delivered to Pugh in pledge, and as security, two notes of the defendant, Ferguson, for eight hundred dollars each, dated March 14, 1874, and payable to Frank's order one and two years after their date, which were secured by a special mortgage and the vendor's privilege on two lots in Shreveport. In March, 1875, Ferguson, being about to execute a mortgage to the plaintiff upon the same property, procured from Frank a waiver of his precedence, and agreed that the plaintiff's mortgage should prime his. Upon the foreclosure of plaintiff's mortgage, and the sale of the property, Pugh filed a third opposition to the payment of the proceeds of sale to the plaintiff, and claimed them for himself to an amount sufficient to satisfy the two notes held by him.

The lower court held that Frank's waiver was effectual, and displaced the mortgage which secured the notes pledged to Pugh. We do not think so.

It is well established that the holder, transferee, or pledgee before maturity of a negotiable promissory note as collateral security is entitled, to the extent of his debt, to all the rights of a *bona fide* holder for value, and is for all practical purposes the owner of the obligation. *King vs. Gayoso*, 8 New Series, 370; *Nott vs. Watson*, 11 An. 664; *Bank vs. Gaiennie*, 21 An. 555. When a debtor wishes to pawn promissory notes, stocks, etc., he shall deliver them to the creditor, and such pawn so made without further formalities shall be valid as well against third persons as against the pledgers thereof, if made in good faith. Civil Code, article 3125, new number 3158.

"When the bill or note of a third party, payable to order, is indorsed as collateral security for a debt contracted at the time of such indorsement, the indorsee is a *bona fide* holder for value in the usual course of business, and is entitled to protection against equities and offsets and other defenses available between antecedent parties, provided, of course, that the bill or note transferred as collateral security is itself at the time not overdue. And the same principle applies when the collateral bill or note is payable to bearer, and is transferred to the creditor by delivery. This doctrine rests upon clear grounds. There is an evident present consideration for the transfer of the collateral bill or note; a present change in the legal rights of the parties. And the text-writers, supported by an almost unbroken train of decisions, agree that the indorsee is entitled to protection to the extent of the debt secured." *Daniel's Negot. Instruments*, sec. 824.

And that the holder and pledgee of the notes in this case held also the rights under the mortgage which was a security for their payment is equally clear. "The assignment of a debt, by whatever form of transfer, carries with it any bill or note by which it is secured; and the transfer by indorsement or assignment of a bill or note carries with it all

securities for its payment, whether a mortgage or otherwise." *Idem*, section 748.

The sale or transfer of a credit includes every thing which is an accessory to the same, as suretyship, privileges, and mortgages. Civil Code, art. 2615, new number 2645.

The mortgage is accessory to a principal obligation, which it is designed to strengthen, and of which it is to secure the execution. Civil Code, article 3251, new number 3284.

The transfer of a negotiable note by indorsement operates a transfer of any mortgage given to secure it. *Augusto vs. Renard*, 3 Rob. 389; *Perot vs. Levasseur*, 21 An. 529.

The plaintiff contends that the waiver by Frank of his antecedent mortgage gave the precedence to that just then executed in favor of plaintiff; but Frank had parted with the possession of the notes, and had not the right to deprive his transferee of the accessory security. The holder of mortgage notes, payable to order and duly paraphed, alone has the right to raise the mortgage, or release the privilege given to secure their payment, and the recorder has no right to cancel the mortgage without the production of the notes themselves, and upon the order of the holders thereof. Civil Code, article 3345, new number 3382. The erasure and cancellation of a mortgage by the recorder will not bind the mortgagee when it has been done without his knowledge or consent, and he may enforce his rights under the mortgage against the property mortgaged. He may show that the certificate is untrue, and that the recorder acted on insufficient evidence, and without his consent. *Dreux vs. Dacourneaux*, 5 Martin, 625; *Lafarge vs. Morgan*, 11 Martin, 525; *Macarty vs. Landreaux*, 8 Rob. 130. These enunciations of legal principles are made in the language of the Code, and the decisions of this court through a series of years, and justify the claim of the third opponent to be paid out of the proceeds of the sale. But he can claim only the amount of the debt which Frank owes him, and to secure which the mortgage notes were pledged.

Therefore, it is ordered, adjudged, and decreed that the judgment of the lower court is avoided and reversed, and it is now ordered and decreed that J. B. Pugh is entitled to be paid the amount of the two notes of Frank, executed to him, for six hundred and seventy-two dollars and five hundred and sixty dollars, and interest thereon, and that the sheriff of the parish of Caddo pay such amount to the opponent out of the proceeds of sale of the mortgaged property, and that opponent recover of the plaintiff the costs of his opposition in the lower court and the costs of this appeal.

Mr. Justice Egan recused himself in this case.

Cole vs. Smith.

No. 702.

E. H. COLE, ADMINISTRATOR, vs. JAMES SMITH, ADMINISTRATOR.

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Parol evidence is admissible to explain that a party's name on a negotiable instrument was not intended as an indorsement.

APPEAL from the Twelfth Judicial District Court, parish of Catahoula. *Taliaferro, J.*

Wade R. Young, for plaintiff and appellee.

Boatner & Elam, for defendant.

The opinion of the court was delivered by

MANNING, C. J. The representative of Ranson Riddick's estate is sued for his alleged liability as indorser of a promissory note.

J. A. White executed the note in favor of Riddick in payment of a tract of land sold him. At its maturity White was unable to pay the whole sum due, and agreed with John Cole to sell him one half of the land in consideration of his paying the residue of the note. Cole, White, and Ranson Riddick went to Noah Riddick's house to perfect this arrangement and take up the note. Noah narrates the way in which it was done.

He was debtor to Cole for fifteen hundred dollars, about the sum still due on the note, and gave a draft for it to the holder, Ranson Riddick, in payment of the note. This draft was paid, and Ranson was satisfied. Ranson then wrote his name on the back of the note, as is often done by a holder of a note or draft when payment is received. He is sued upon that indorsement, and when his representative offers to prove how it was made, for what purpose, the circumstances attending the act, and the intent of all the parties, he is met by the objection that parol evidence is not admissible to contradict or vary the terms of a written instrument.

The object of the testimony was to prove payment, and to explain that what was in appearance an indorsement in the legal and commercial sense of that word, was, in fact, a receipt. It has been often held that such testimony was admissible for that purpose. *Frique vs. Hopkins*, 4 New Series, 222; *Peytavin vs. Maurin*, 2 La. 481; *Bethany's case*, 7 Rob. 61; *Bouche vs. Michel*, 10 Rob. 92; *Saramia vs. Courrégé*, 13 Annual, 25. It could not be otherwise. Courts of justice would be a mockery if the rules of evidence applied by them excluded the ascertainment of the circumstances attending such a transaction as this, or permitted the holder of an instrument, delivered to him for a specific purpose, to make it available for another and wrongful one. Cole took possession of the note to hold it against the maker until the title to one half of the land should be made to him. As to Riddick, it was a receipt.

There was judgment for plaintiff. The testimony showing the real

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character of the legal act which resulted in Ranson Riddick writing his name upon the paper was improperly excluded. The authorities cited by plaintiff relate to a different prohibition.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court is avoided and reversed, and that there be now judgment in favor of defendant with costs of both courts.

No. 728.

J. H. REINHOLD VS. JOHN T. LUDELING ET AL.

The members of a corporation, organized under the laws of this State, for the purpose of transporting persons or property for hire, are not liable individually, or *in solido*, for the obligations of the corporation executed by its authorized officers.

A PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Parsons, J.*

R. W. & R. Richardson, for plaintiff and appellant.

Frank P. Stubbs, for defendants and appellees.

The opinion of the court was delivered by

MARR, J. This is a suit against John T. Ludeling, John Ray, Francis P. Stubbs, Wesley J. Q. Baker, and William R. Gordon, to recover of them *in solido* the amount of two promissory notes of the North Louisiana and Texas Railroad Company, one dated the first of January, 1871, payable one day after date, to the order of J. H. Reinhold, for two thousand dollars, signed "John Ray, president," countersigned "Joseph F. McGuire, secretary;" the other dated the twenty-first of January, 1874, payable one day after date, to the order of George C. Waddill, for three thousand dollars, signed "John T. Ludeling, president N. L. & T. R. R. Co.," countersigned "Joseph F. McGuire, secretary."

The petition charges that the defendants and their associates purchased at sheriff's sale, on the third of February, 1866, all the property, rights, and franchises of the "Vicksburg, Shreveport, and Texas Railroad Company," and, after having operated the same as a railroad under the old name for a considerable length of time, they, the defendants, with others, Geo. C. Waddill, James M. Horne, and Wm. M. Pinckard, were, by the provisions of act No. 108 of 1868, "specially created into a body corporate and politic, for the purpose of constructing, maintaining, and operating a railroad and magnetic telegraph on the line of the railroad which had been purchased by them on the third of February, 1866, the road to be used for the purpose of transporting freight of every kind.

Reinhold vs. Ludeling.

and passengers, the name and style of the corporation to be 'the North Louisiana and Texas Railroad Company,' with domicile at Monroe."

The petition goes on to charge that "defendants, with their associates, did operate said road under that firm name *and by authority of said act of incorporation*; that John Ray and John T. Ludeling were presidents of said company and Joseph F. McGuire secretary on the respective dates that their names were affixed to the obligations in suit;" that they did run said railroad; that they did carry freight and passengers for hire; "were *common carriers and commercial partners*; and by their acts and declarations induced other third persons as well as petitioner to trade with them and accept their paper and written obligations, under the assurance that they (defendants) were bound *in solido*; that they so held themselves out to the world, and while thus associated as common carriers and commercial partners they executed and issued, *by their duly authorized and empowered officers*, the obligations in suit, of which petitioner is legal holder and owner for a valuable consideration."

The prayer is for judgment *in solido* against defendants for the amount of the two obligations, with interest as stipulated.

After exceptions to the service of the citations, which were overruled, and which need not be noticed, defendants answered, beginning with a general denial. They admitted that the notes sued upon were executed by "the North Louisiana and Texas Railroad Company, a corporation incorporated by the General Assembly of Louisiana in the year 1868; but they deny that they are personally responsible for the obligations of said corporation."

The judgment of the district court was in favor of defendants as in case of nonsuit. Plaintiff appealed; and defendants in their answer pray that the judgment be so amended as to be final against the demand of plaintiff.

The capacity of John Ray and John T. Ludeling as successive presidents, and of Joseph F. McGuire as secretary, of the North Louisiana and Texas Railroad Company, and the genuineness of their respective signatures to the notes sued on were admitted.

It was also admitted that J. W. Greene, receiver, since the thirteenth of April, 1875, operated the road; that during the presidency of Ray and Ludeling, at the time the obligations sued on were executed, the road, while in operation, transported persons and personal property for hire.

There were other admissions and proof which require no special notice beyond the fact that J. W. Greene took possession of the road as receiver under the appointment of the United States Circuit Court; and that none of the officers of the company had any thing to do with operating the road after Greene took possession. The allegations of the petition were proven substantially as charged, except that we find no proof of

any representations by defendants to the effect that they were bound *in solido* for the debts and obligations of the company.

The entire case of the plaintiff rests upon the theory that all persons who engage in the business of transporting persons and personal property for hire, that is, all common carriers, are commercial partners and as such bound *in solido*.

In *Chaffe & Bro. vs. Ludeling et al.*, decided in 1875, reported in 27 An., which was a suit on an obligation like those sued on in this case, except that it was executed in November, 1866, nearly two years before the act incorporating defendants, our predecessors held that no other common carriers are liable as commercial partners but those who prosecute that business by the use of ships and other vessels; and that defendants, as an incorporated association, were liable jointly, and not *in solido*.

We are not prepared to assent to this doctrine; but under the view we take of this case it is not necessary to pass upon that question. It may not be out of place, however, to say that at the time the Civil Code was adopted the business of common carriers in Louisiana was confined almost exclusively to transportation by water. Moreover, it was intended at that time to adopt a "Commercial Code," and the frequent references in the Civil Code to the "Commercial Code" show plainly that the compilers of the Civil Code designed to deal with commerce in general terms only, and to defer to the "Commercial Code" for details and a complete system of commercial law. The "Commercial Code" was not adopted, and the Civil Code contains but few rules of commercial law.

The character of a partnership must be determined by the object for which it is formed, the business intended to be pursued; and the Code characterizes as a commercial partnership that which is formed "for carrying personal property for hire in ships or other vessels." R. C. C. 2875. Manifestly, this is a mere description, not a limitation, of the means and instrumentality by which a business or pursuit to which the law attaches the obligations of a commercial partnership may be conducted. A strict literal interpretation of the article of the Code would exclude common carriers of passengers only, and would illogically, without reason, attach more importance to the vehicle used than to the business for which it is used in determining the obligations resulting from that business. But we need not pursue this subject, for the reason that it is not necessary to the decision of the case.

Several bills of exception were taken to the rulings of the court in admitting and in rejecting testimony on the trial. As the testimony offered was wholly immaterial, and could in no manner affect the rights of the parties, it is not necessary to pass on these rulings of the court.

Both the obligations sued on in this case are promissory notes of the North Louisiana and Texas Railroad Company in its corporate name

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and capacity, through its proper officers, under the act of incorporation. The petition fails to disclose any consideration whatever for these notes; and the case stands solely upon the assumption that they are obligations of the corporation, executed and issued by its "*duly authorized and empowered officers*," and that they import a sufficient consideration.

It is not possible to raise the question more distinctly or to present it more plainly and simply: "Are the members of an incorporated company, organized and established mainly for the purpose of transporting persons and property for hire, liable *in solido*, individually, as commercial partners, upon promissory notes of the corporation, executed and issued by its *duly authorized and empowered officers*?"

Solidarity of obligation necessarily implies a plurality of obligors. The owners of ships and other vessels, who employ them in the transportation of personal property for hire, are liable *in solido* as commercial partners with respect to that business; but it would be quite idle, wholly without meaning, to say that the sole owner of a ship or other vessel, who employs it in carrying personal property for hire, is liable *in solido* and as a commercial partner. Sole obligor, sole beneficiary of his contracts and engagements, he alone is liable.

An act of incorporation makes the corporators, however numerous, one single juridical person, one single whole. The corporators no longer have individuality, so far as the relations of the corporation with others are concerned; and the several individualities are aggregated and merged into one creation of the law, the corporation which they compose. In all contracts, all dealings of the corporation, it is not the individual members who speak, and who act, and who bind themselves. It is the corporation, and the corporation alone; and the corporation is as truly a unit, one single juridical being and personage, as is individual man in his individual acts and engagements. If solidarity is not applicable to the single engagements of an individual doing business, whatever it may be, in his individual name, and for his individual account and benefit, how can that term apply to the contracts, and engagements, and obligations of a corporation not less a unit, not less ONE?

A number of persons, associated for the carrying of personal property for hire, in ships or other vessels, do, either by special contract, or in legal intentment, form a commercial partnership, and they are bound *in solido*; but when the same individuals associate themselves under a charter of incorporation, they do not form a partnership, but do, by contract, and in legal intentment, form and constitute a juridical being, called a corporation; and if, in accordance with its organic law, the act of incorporation, this juridical being, this corporation, pursues the same business, there are no longer individuals contracting and engaging them-

selves, there is no longer an association which the laws call a commercial partnership, there is simply one personage, one juridical being. The individual corporators are not bound; the single juridical being, the corporation alone, is bound; and it is bound in its aggregate capacity as one personage, just as one individual man is bound by his single contracts and engagements.

These principles are elementary, and they are laid down and formulated in the Civil Code, chapter ten, in plain and unequivocal terms. The plaintiff contracted with the corporation, not with the individual members, as the notes sued on clearly prove; and he must seek his remedy against the corporation, his debtor, not against the individual members, who are not his debtors.

The defendants are entitled to the amendment prayed for in their answer to the appeal. The notes sued on and the allegations of the petition show that these are the obligations of the corporation in its corporate name and capacity, by its "*duly authorized and empowered officers*," and not the obligations of the individual members; and the law, Revised Civil Code, article 437, declares that such obligations can be enforced only through the president and against the property and effects of the corporation. The corporation may be bound, its property and effects may be liable, for these notes; but the individual members are distinct from the corporation, and they are in no manner bound for its obligations. It would be improper to render a decision in this case which would conclude the holder with respect to the corporation or its property, but he has no claim against the defendants, individuals who, with others, composed the corporation; and they are entitled to a final decree to that effect.

It is to no purpose to say that this corporation is not actively engaged in the business for which it was organized. If the individual members were not bound originally, it is difficult to perceive how they could become liable by a change in the condition of the corporation, by the loss of its property, by the suspension or discontinuance of its business, even by its dissolution. Creditors may proceed against the corporation, or they might provoke a liquidation, and thus reach the property and effects of the corporation; but they have no right of action on the contracts of the corporation against the individuals composing the corporation.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be thus amended: That there be final judgment in favor of defendants, against plaintiff, rejecting the demand of plaintiff, and dismissing his petition and suit; that the rights of the plaintiff, as holder of the two notes sued on as against the North Louisiana and Texas Railroad Company, be reserved and remain wholly unaffected and unim-

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paired by the proceedings and decree in this case; and that, thus amended, the judgment appealed from be affirmed with costs.

DISSENTING OPINION.

EGAN, J. I dissent from so much of the opinion and decree as holds the defendants in no manner to be liable individually for the debt sued for. They may not be liable in this action, and yet be or become so as individual corporators, at least to the extent of any unpaid stock, should the debt not be otherwise satisfied.

No. 723.

WILLIAM MARBURY, JR., ET AL., TESTAMENTARY EXECUTORS, AND JOSEPH P. CROSLY VS. JAMES F. PACE.

Neither a citation of the defendant, nor a previous judgment of default, is necessary to the validity of a judgment based on the *confession* of the defendant.

A PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Parsons, J.*

R. W. & R. Richardson, for plaintiffs and appellees.

Garrett & Garrett and *F. P. Stubbs*, for defendant.

The opinion of the court was delivered by

DEBLANC, J. On the eighteenth of April, 1867, more than ten years ago, plaintiffs filed in the district court for the parish of Ouachita a petition at the foot of which we have found the copies of two notes, for each eight hundred dollars, dated at Trenton, on the thirtieth of January, 1861, payable to the order of Slaughter & Crosley, one on the first of March, the other on the first of November, 1861, with interest at eight per cent from their maturity.

These notes were signed and delivered by defendant. On the eighth of October, 1866, he acknowledged said notes, and waived the prescription thereon.

On the twenty-fifth of March, 1867, he confessed judgment in favor of plaintiffs for the amount of those notes, with interest thereon at the rate of eight per cent from the first of March, 1864. For the payment of that judgment, he was allowed a delay of nearly two years.

In April, 1867, the district court rendered judgment against him. That judgment, according to its terms, is based, not only on defendant's undenied confession, but on the law, and on the evidence adduced in the case.

That judgment was forgotten in the archives of the court; no execution appears to have issued on the same. It was only in the month of March, 1877, that steps were taken to avoid an impending prescription and revive the judgment.

The suit for the revival was filed, and the usual citation served on defendant. This, he alleges, is the first notice he has had that such a judgment existed against him. He immediately applied for and obtained a suspensive appeal from the decree rendered in 1867, on his own confession, on his acknowledgment of the debt, his renunciation to a partly acquired prescription, and, we presume, on the two notes, copies of which precede that renunciation and confession.

Through their counsel, plaintiffs pray that the judgment of the lower court be amended, and defendant that it be reversed.

The grounds urged against the judgment and for its reversal are:

First—That it was rendered without previous default, and on insufficient evidence.

Second—That defendant was not indebted unto plaintiffs; but, as he was not cited, the judgment was obtained against him through error and fraud.

First—It is only when the defendant fails to appear, either in person or by his advocate, that a judgment by default may be taken against him. In this case, defendant appeared in person, and joined issue by confessing the facts set forth in plaintiffs' petition. His appearance not only dispensed but precluded plaintiffs from taking a default against him. C. P. 310, 357, 534.

As soon as the petition and confession were filed, the issue was joined, the suit began, and the judgment was rendered on as cogent, as incontestable, and as convincing evidence as can be submitted to a court of justice; the two notes sued upon, the acknowledgment of the notes, the confession of defendant, and his signature, his undisputed and admitted signature attached to the notes, to their acknowledgment, and to the confession. It would have been impossible to add to the proof which we have found in the transcript; that proof fully sustains the judgment.

Second—The issuance of a citation to, and its service on, one who has already confessed a judgment would be as vain and as useless a proceeding as one can imagine; for what is the object of citation? To summon defendant to comply with petitioners' demand, or deliver his answer in the office of the clerk of the court. When his answer is filed, and that answer expresses a willingness to comply with the demand, a citation to appear and do what the party has already done is not only not required but unauthorized.

Citation is the essential ground of all civil action, in ordinary proceedings, and, without it, those proceedings are absolutely null, unless the

defendant, of his own will, has appeared in the suit, and answered the demand. Defendant, Pace, has done nothing less; he has appeared, and, in the sense of the law, his written confession is one of those answers which waive citation, delay, and default, and left no issue to be tried. 5 R. R. 448.

We are referred to Bouvier and Burrill for the meaning of the word "defendant," and we are informed that, without a suit, there can be no defendant. That a suit is a condition precedent to a confession of judgment, which can be made but by a defendant and in a *judicial proceeding*. We believe otherwise; the confession may be made in or out of court, before or during the trial. It must be proven on the trial and in court. The law does not prescribe any special form for the confession of a judgment.

That confession did not create a new obligation; no new debtor or creditor was substituted to those who held and owed the notes, and, if it were so, that fact would in no way affect the judgment, which is based on the evidence, the law, and the written confession of defendant duly proven in open court.

The charge that the judgment was obtained through fraud is repelled by defendant's acknowledgment of the debt; by his confession, which is couched in terms not calculated to take by surprise or deceive any one.

His counsel complains of an error made in the allowance of interest from 1861, instead of 1864. That error is the only one which exists in the judgment appealed from, and plaintiffs themselves have asked that it be corrected.

It is therefore ordered, adjudged, and decreed that, in so far as it allows interest at the rate of eight per cent on plaintiffs' claim, from the first of March and November, 1861, the judgment of the lower court be and it is hereby annulled, avoided, and reversed. And by reason of the law, the confession of judgment, and the evidence herein referred to being in favor of plaintiffs it is further ordered, adjudged, and decreed that they recover of the defendant, James F. Pace, the sum of sixteen hundred dollars, with eight per cent per annum interest thereon from the first of March, 1864, and the costs of the lower court. It is further ordered, adjudged, and decreed that, as above amended, the judgment of the lower court be and it is hereby affirmed; the costs of the appeal to be paid by plaintiffs.

Rehearing refused.

No. 752.

R. B. BURNS VS. A. H. VAN LOAN ET AL. AND J. L. HARGROVE VS. RUFUS STANLEY ET AL. CONSOLIDATED.

The sale of the property of an absentee, who owes no debts, and is living at the time, made by one who has obtained its administration, under an order of court, without any proof having been made that the absentee was dead, or had been absent for ten years and not heard from, is null and void.

A sale made by an order of court without authority to give the order, is utterly void and prescription will not run in its favor.

A PPEAL from the Tenth Judicial District Court, parish of Caddo. *Looney, J.*

J. L. Hargrove and Hicks & Hicks, for plaintiffs and appellees.

W. D. Wylie, C. C. Henderson, Looney & Elstner, W. N. Wise, and L. M. Nutt, for defendants.

The opinion of the court was delivered by

MANNING, C. J. In 1833 Patrick S. Ivers entered the land in controversy at the United States Land Office in Natchitoches, and paid part of the price. The land is in Caddo parish. Ivers was a strolling peddler. It does not appear where he lived at that time, if, indeed, he had any fixed habitation in this State. He had disappeared many years, when, in 1858, T. P. Hotchkiss applied to the court of Caddo parish to be appointed administrator of his succession, alleging that Ivers had "departed this life many years ago, leaving in this parish a small amount of property which is necessary to be administered."

On the nineteenth of July, 1858, evidence was taken on this application for administration, and there was offered—

First—The publication of the notice of the application.

Second—Oral proof that the newspaper in which the notice appeared is published in Shreveport.

No other testimony was offered or required. It is singular that when such particularity was observed in proving what would have been as well proved by filing copies of the newspaper, no one thought of proving that Ivers was dead.

Hotchkiss was appointed administrator, qualified, and petitioned the court for a sale of the land belonging to the succession. That was the sole property, and the petition alleged that "there are debts due from the succession, and it is necessary to sell the land to pay them." An order of sale was thereupon entered, dated September 11, 1858. It was not until three days afterward, on the fourteenth, that the attorney of absent heirs "accepted service of the petition, and waived time and citation." The sale took place, the administrator made title to the purchaser, and the defendants claim under that title through mesne conveyances.

While these proceedings were going on in Caddo parish, Ivers was living

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120	43
29	560
125	541
125	542

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with his family in Mississippi. A witness who had known him from boyhood, and during forty years, saw him near Monticello, in that State, in 1864. He died there in 1869. He had never completed the payment for the land to the Government, but his children did after his death, and a patent issued on the nineteenth of November, 1874, to Patrick S. Ivers, reciting that from the certificate of the register of the land-office at Natchitoches it appeared that full payment had been made for the land. The plaintiffs derive title from the heirs of Ivers under this patent.

The defendants contend that Ivers's long absence from the State created the presumption of death, and therefore his succession was properly opened, and the sale made under the order of the court is valid. They plead ownership and possession under this title, and the prescription of ten and twenty years.

When a person possessed of property within this State shall be absent, or shall reside elsewhere, and shall not have appointed somebody to take care of his property, the judge shall appoint a curator to administer it. This curator has no other power than that of administering the property, and has not the right to alienate or mortgage it under any pretense whatsoever. His responsibility is the same as that of a tutor; the mortgage by which tutors are bound attaches to him, and he has the same annual compensation. Whenever the curator shall apply to the court by petition, setting forth under oath that the absentee has not been heard from for ten years, and that he has no heirs, known to the curator, residing in the State; or if the judge knows these facts, or any other person than the curator shall make proof of them to the satisfaction of the judge, then it is his duty to order the sale of the property of the absentee and the payment of the funds arising from the sale into the State treasury. The curator of the absentee may file annual accounts of his administration, and have them homologated contradictorily with a curator *ad hoc* appointed for that purpose, and, when his administration ends, he must give an account of it. Civil Code, articles 50, 53, 56 (new Nos. 47, 50, 55; interpolated articles 53-4 in the revisal of 1870).

All of these provisions are contained in the Code of 1825, save that relative to the sale of the property, which became law in 1855 (Revised Statutes of 1856, p. 1), and which is incorporated in the revisal of the Code of 1870. None of them have been complied with. Instead of appointing a curator to administer the property, *i. e.*, to take care of it, to conserve it (for the word is manifestly not used here in its technical sense), who should render annual accounts of his gestion, and, when ten years have passed and the absentee has not been heard from, should apply to the court for a sale of his property upon a statement under oath of such absence, there was appointed an administrator, without proof either of death or ten years absence, or of any absence at all, who proceeded immediately to sell.

There is not intended here any finely-drawn distinctions between the two designations of the officer who is charged with the estate of the absentee. The defect of the proceeding does not consist in the nomenclature adopted. Whether he was denominated curator or administrator matters not, but the validity of his acts as the representative of the law, who had control of the property of the absentee, must be tested by the law. The Code of 1825 gave him no power either to alienate or mortgage the property. It expressly withheld that power from him. It contemplated a long administration of it, as a tutor has of a minor's oftentimes, and permitted him to file annual accounts. It was only terminated when the absentee appointed an attorney in fact for the administration of his estate, or, when a certain time having passed without hearing of him, his heirs caused themselves to be put provisionally in possession of it. Civil Code, article 55 (new No. 52). The Legislature of 1855 provided a new mode of terminating this administration of an absentee's property. If the absence shall have continued ten years, a sale may be effected in the manner and under the circumstances detailed in the act of that year.

But in this case there was no curator who had been burthened for ten years with administering the property of an absent owner, and who desired to avail himself of this legislative permission to sell and pay the proceeds to the fisc. Nor was the treasury much benefited, since the payment was made August 1, 1863, when the only currency of that locality was greatly depreciated. If there had been creditors, the case would have been wholly different. But Ivers owed nobody. The debts which the property was sold to pay were all created by the proceedings for selling it. If Ivers was alive, and any one was desirous of benefiting him, he could apply for the curatorship, and administer his property, taking care of it and conserving it. If he was dead, his heirs owned the property, and it was their concern to protect their interests. The sole object of the administration was to sell. The meagre account shows that nobody was paid any thing, and nobody claimed any thing, except the clerk, and sheriff, and attorney, and printer, and administrator. Three hundred and seventy-four dollars were paid into the treasury.

If Ivers had been dead at that moment, all this would have been wrong. Our law does not contemplate an administration of a succession, if there are no debts. Its settlement is otherwise provided for. Therefore, if Ivers had been away long enough to create the presumption of death, and it was lawful to settle his succession as if he were dead, this mode of settlement is unlawful. One can not raise an illegal presumption of death, and, acting upon it, dispose of the property in a manner which would be illegal if the owner were dead. There was no proof whatever of prolonged absence, in order to create the presumption of

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death, nor proof of actual death. And if the succession sale of Ivers's property, upon which the defendants rest as the source of their title, is illegal, because not conducted under the forms for alienating a decedent's property, nor under the forms for alienating an absentee's property, much more is it invalid when made during the life of its owner, and when no necessity for the alienation existed. The title of Hotchkiss as administrator is null, because he had no authority to make it, and the prescription pleaded does not validate it. It was not a sale the informalities of which are cured by a certain lapse of time, and which becomes perfect through prescription, but it was void because the court was without authority to order it. *Morton vs. Reynolds*, 4 Rob. 26; *McCluskey vs. Webb*, *idem*, 201; *Robert vs. Brown*, 14 Annual, 598.

A. H. Van Loan, one of the defendants, had entered a part of this land by permission of the register of the land-office at Natchitoches, and other parties had effected entries before his was made. This elicited the following letter of instructions from the Commissioner of the General Land-Office at Washington to the register at Natchitoches. It is dated April 1, 1873:

"On the first of October, 1872, you were advised of the cancellation of homestead entry No. 748, Abraham H. Van Loan, upon the (here follows description by sections, range, etc.), for conflict with the prior cash entry of Patrick Stanbury Ivers, No. 998, dated January 27, 1833, for the north-west quarter of said section, and that the above was the third entry allowed upon said tract, contrary to express instructions contained in the above letter. You have allowed Mr. Van Loan to commute his entry to cash, under the eighth section of the act of May 20, 1862. You will please advise Mr. Van Loan of the cancellation of his commutation entry, and that the purchase money paid thereon will be refunded upon proper application being made through you to this office."

It is urged on the part of the defendants that the decree of the court ordering the sale of the succession property should protect them, and, as the court which thus ordered the sale had jurisdiction of successions, it was not for them to look beyond it. But that is assuming as true that which we know was not true. The owner was not dead. There was no succession. Chief Justice Marshall thus disposes of that position:

"To give the ordinary jurisdiction, a case in which, by law, letters of administration may issue must be brought before him. In the common case of intestacy it is clear that letters of administration must be granted to some person by the ordinary, and, though they should be granted to one not entitled by law, still the act is binding until annulled by the competent authority, because he had power to grant letters of administration in the case. But suppose administration to be granted on the estate of a person not really dead. The act, all will admit, is totally void. The

ordinary must always inquire and decide whether the person whose estate is to be committed to the care of others be dead or in life." *Griffith vs. Frazier*, 8 Cranch. 9.

And it can not with reason be contended that the defendants were prudent, or not careless, in purchasing under a title which had on its face so many features to warn against approach. The proceedings in the succession should have put every inquirer on his guard.

The judgments of the lower court in both cases were for the plaintiffs, and they are affirmed.

29	564
118	454
118	455

No. 753.

GEORGE J. JONES VS. SUCCESSION OF NATHAN HOSS ET AL.

When an administrator is ordered by the court to lease succession property at public auction to the highest bidder who shall furnish approved security, he may at once, without additional advertisement, re-auction the lease, if the highest bidder at the first auction fails to furnish the prescribed security.

A liability for damages on account of any malicious wrong is strictly personal. A judgment in favor of a party who has subrogated another to his claim is illegal.

A PPEAL from the Tenth Judicial District Court, parish of Caddo. *Looney, J.*

Nutt & Leonard and Hicks & Hicks, for plaintiff and appellee.

W. H. Wise, for defendant.

The opinion of the court was delivered by

MARR, J. Nathan Hoss, in his capacity as administrator of the succession of E. C. Hart, by order of the parish court of Caddo, offered at public auction, on the twenty-fourth of December, 1872, the lease for the year 1873, of the Island Plantation, belonging to the succession.

The advertisement, published in the newspaper, announced that "the lessee will be required to give a note, with approved personal security, payable January 1, 1874, in favor of Nathan Hoss, administrator;" and this was publicly announced by the auctioneer.

At the public offering George J. Jones was the highest and last bidder. He named the security, which Hoss would not accept. He said he could give other security, and he was told this must be done or the lease would be re-offered during the legal hours, which closed at four o'clock. Failing to furnish the security, the lease was again offered, and it was adjudicated to White, who immediately complied with the terms and gave the requisite security.

Jones was in possession under a lease for the year 1872, and Hoss was

Jones vs. Succession of Hoss.

compelled to have him dispossessed by the sheriff, by order of the parish court, on the seventh of January, 1873.

Nearly a year after this, on the nineteenth of December, 1873, after the death of Hoss and of Lewis, the auctioneer, who adjudicated the lease, Jones brought this suit against the executors and heirs and tutrix of the minors and the widow of Hoss, to recover three thousand dollars damages for loss of the profits which he would have made on the leased property, and twenty-five hundred dollars additional damages for the malicious outrage and indignity and injury to his credit caused by the conduct of Hoss.

The judgment of the court below was in favor of George J. Jones against the succession of Hoss, represented by the executors and the heirs named in the petition, for \$1892; and the defendants appealed.

It was the perfect right of Nathan Hoss, it was his duty, as the representative of the succession of Hart, to require immediate and strict compliance with the terms of the letting, which was by order and authority of the parish court. All those who attended the auction knew that approved personal security would be required; and it was the business of those who intended to compete for the lease to be prepared to furnish undoubted security, for the administrator would have been derelict in duty if he had accepted doubtful security.

The names offered by Jones were not satisfactory, not such as the administrator would approve; and the lease was properly re-offered after a delay of not less than two to two and a half hours. The administrator was not obliged to resort to the "*folle enchère*." He might have done so and held Jones responsible for any difference between his bid and that obtained at a subsequent offering; but he was not compelled to do this. The adjudication was not complete, because it was conditioned upon the giving of approved personal security; and the failure of Jones to comply with the terms authorized the treating of his bid as a nullity and the re-offering of the lease.

There were circumstances in the case which required the administrator to be extremely cautious in his dealings with Jones. Jones had leased the plantation for the year 1870, and the administrators were compelled to sue him and to resort to provisional seizure to secure the rent. He leased it again for 1871, and again the administrators sued and seized provisionally. He leased it again for 1872, and again suit was brought and provisional seizure and attachment for the rent. These three cases were then pending, and the rent for three years was unpaid. The suits were consolidated and finally disposed of by decree of this court at the July term, 1874, in favor of the administrators. 26 An. 659.

It was proven in that litigation that Jones had given the administrators a draft on his commission merchants in New Orleans for the rent

for one of the three years, and had notified them not to accept or pay the draft; and he pleaded the giving of this draft as a novation of the debt and a discharge of the lessor's privilege. The defenses set up were held, and we think properly, to be without merit or legal foundation.

No man in his senses would have been willing to renew a lease with such a tenant if he had been dealing with his own property. Certainly the administrator would not have been justified in letting to him the property of the succession without security, good and safe beyond doubt; and it is difficult to understand how any responsible person could have consented to become security for him. Hoss might well, when he saw Jones bidding, have told the auctioneer not to accept his bid. As it was accepted, it was the business of Jones to have furnished such security promptly as the administrator could not have reasonably objected to. It was near the end of the year, the period at which those intending to cultivate leased property make their arrangements; and it might have been greatly prejudicial to the succession to have waited upon the uncertainty of compliance by Jones with the terms of the letting, to do that which he knew in advance he would be required to do, and which he should have been prepared to do at once. In the event of his failure, if the day had passed, a new order of court might have been required, certainly new advertising and additional expense would have been necessary; and Hoss did no more than his duty in disregarding Jones's bid and re-offering the lease.

That part of the demand which is based upon the alleged malicious outrage and indignity need not be seriously considered. Actions for such wrongs die with the wrong-doers; and they can not be maintained against the heirs and representatives of the deceased, even when they are well founded in fact.

We find in the record, as part of the evidence, filed in the cause on the day of its date, ninth of December, 1874, a writing by which George J. Jones, in consideration of his indebtedness to his brother, A. J. Jones, in the sum of fifty-two hundred dollars, with interest from 1870, transfers to A. J. Jones "the claim in the above-entitled suit, and I subrogate him to all my rights in the same and give him full power to control and manage the same, to be held and used by him as security for the payment of the above sum as collateral security."

Strange to say, on the fourteenth of May, 1877, about two years and a half after George J. Jones had thus divested himself of all right to and power of control and management of the suit and claim, judgment was rendered in his name and in his favor in that suit upon that claim. Of course, George J. Jones no longer had any suit to prosecute or right or claim to be enforced. The judgment is erroneous in that respect, and

could not be maintained, even if there had been any merit in the suit originally, which we do not think there was.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that the suit of plaintiff be dismissed with costs in both courts.

Mr. Justice Egan, having been of counsel, is recused.

Rehearing refused.

No. 692.

HERMAN MEYER, ADMINISTRATOR, vs. JOSEPH KING, ADMINISTRATOR.

The written acts of a party to a contract, when they express the true intent, and explain the real nature of the contract, are admissible in evidence, even when establishing a different form of contract.

The authority to sign another's name to a single act, if done by order of, and in the presence of the principal, need not be in writing.

A PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Parsons, J.*

*Robert J. Caldwell and John H. Dinkgrave, for plaintiff and appellant.
Cobb & Gunby, for defendant.*

The opinion of the court was delivered by

DEBLANC, J. Defendant, as administrator of the succession of Simon King, advertised to be sold on the seventh of April last, and as belonging to said succession, a tract of land alleged by plaintiff to be the property of the succession of Jesse Sherman.

The intended and advertised sale was enjoined by plaintiff, as administrator of the succession of said Jesse Sherman. He prays that the latter's succession be recognized as the owner of that land.

His injunction and action are based on private instruments, two of which were excluded, and two admitted as evidence by the lower court. The admitted and excluded instruments are the following, to wit:

First—A receipt from Simon King, dated Trenton, La., January 21, 1875, in which he acknowledges that, in part payment of a certain tract of land sold by him to Jesse Sherman, he received from said Sherman the sum of \$168 64.

Second—A written declaration, of the same date as the receipt, delivered by King to Sherman, in and by which the former "obligated himself to wait," in the terms of that declaration, "*for the payment on that land that I sold to Jesse Sherman two years for the payments.*"

Third—An act of lease from Simon King to Jesse Sherman of the land in controversy, for the year 1876, at the rate of three dollars and ten cents per acre, payable on the first of November, 1876.

Fourth—Another act subscribed by Simon King, on the day the lease appears to have been agreed to, in and by which he stipulated “*that the payments made by Jesse Sherman for the lease of the land shall be placed to the credit of said Sherman as of a contract of sale. And, further, that if, on the first of November, 1877, he, Sherman, shall make his second payment, as shown by the recorded lease, or any day after the agreement of parties, then and in that case the whole one hundred and sixty acres of land to revert to him, and their contract to have, in the event of said payment, the force and effect of an act of sale as between the parties.*”

What is called a lease, and the act which reveals its character, were passed on the twenty-fourth of June, 1876, eighteen months after King had acknowledged having received from Sherman, in part payment of the land sold by the former to the latter, \$168 64, eighteen months after the extension of time allowed Sherman to pay the balance then due on the price of the land.

We are left to infer what was the price fixed between the parties, and the balance due on that price in January, 1875. The evidence on that point is vague and incomplete. Was the land cleared? Was it improved? Was it of a good or inferior quality? If it was a forest, who converted it into a productive field? Was it King? Was it Sherman? What was, and what is, its value? For what price was it sold?

Sherman, who was, and who died, poor, would not have imagined and consented to lease, on the twenty-fourth of June, a tract of land which was in his possession at least five months before, and on the successful cultivation of which he depended to satisfy, whatever it may have been, his obligation toward King. From the scanty amount of the inventory of his estate, we can justly presume that his only resource was his labor, and, unless driven from overflowed fields, laborers, in our State, do not lease in June to harvest in November.

In 1876, Sherman raised a crop on the land. When was it commenced? Was it on the twenty-fourth of June? That is not probable. We have every reason to believe that, in January, 1875, Sherman was on that land, and that, when he paid a part of its price, he was not merely in possession, but that his possession dated from either a sale or a promise of sale anterior to the payment of January, 1875. At that time, King acknowledged, over his signature and in presence of two witnesses, that he had sold that land to Sherman; that he had received from Sherman a specified portion of the price of that sale, and that, for the payment of the balance of that price, he had allowed to Sherman a delay of two years.

In one of the agreements of the twenty-fourth of June it is expressly stipulated that, *if on the first of November, 1877, Jesse Sherman makes his second payment, as shown by the recorded lease, he shall acquire title*

Meyer vs. King.

to the whole of the land. The first payment was made; that can not be disputed. Thereafter Sherman was sued, his crop seized, and a second payment was made. Was it not the last that could have been legally enforced by King or the representative of his succession?

We are told that the time fixed for the last payment is the first of November next, 1877. Is not this a clerical error? Does that date correspond with that fixed in the document which evidences the granting of an extension of time? In January, 1875, King bound himself to wait until January, 1877, the space of two years, for the payment of the balance of the price. At that date, cotton is generally gathered, shipped, or disposed of, and it may have been on that account that the time of payment was changed from January, 1877, to November, 1876.

This is but an inference, but one which grows out of positive facts. Two documents were signed by King and delivered to Sherman on the twenty-first of January, 1875. In one of them, the delay of two years is granted, not by fixing any day of any month for the expiration of said delay, but in so many words, "two years." It is not denied that the twenty-first of January, 1875, is the date when those twin documents were signed and delivered, and, as a matter of course, the period agreed upon for the second payment was originally the twenty-first of January, 1877.

To secure King, to give him, on the crop of 1876, the lessor's privilege, to enable him to seize that crop, the lease of June was added to the previous sale or promise of sale. In the lease, the term of payment was advanced; and, as we have already said, the payment which, under the first agreement, was to be made in January, 1877, was fixed, in the lease, on the first of November, 1876.

It is urged that two additional payments were to be made, after that of the twenty-first of January, 1875. That supposition is not sustained by any part of the evidence. The word "payments" is in one of the documents, at the end of the last line; but, in the very same document, King said: "*I obligate myself to wait for the payment on the land.*" In the promise of sale or conditional sale of the twenty-first of June, 1876, there are two important stipulations:

First—The payments made by Sherman were to be credited on the price of the land; and, further, we now copy from the act itself: "*If, on the first day of November, A. D. 1877, Jesse Sherman makes his second payment, as shown by the recorded lease, etc., this contract shall have the force and effect of a sale.*" In this stipulation there is an apparent contradiction. The only payment to be made, at least *as shown by the act of lease*, was to be made on the first of November, 1876. That clear and positive declaration "*as shown by the lease,*" could not have escaped the parties' attention, and repels the conclusion that any payment was fixed

for the first of November, 1877. Under this construction, the second payment, the payment which was to give to the parties' contract the effect and the force of a sale, was made before the institution of this suit.

Defendant has filed and urges the plea of *lis pendens*. That plea was properly overruled. Sherman's representative could not legally resist the payment of the balance due to the succession of King; but, as soon as that payment was made, the right of action to recover the land or enjoin its intended sale accrued to the succession of Sherman. If that payment was the second, it vested the title to the land in the last-mentioned succession. If, as alleged by defendant, there is still another, a third payment, to be made in November, 1877, the term of the presumed obligation has not arrived, and the administrator of the estate of King could not, before that term, advertise for sale the land in controversy.

The receipt from King to Sherman, and the agreement for an extension of time, should not have been excluded by the lower court; they constitute, if not a complete title, the commencement of a title; they do not contradict, they explain, the act to which the parties have given the form of a lease; they corroborate the stipulations of the instrument called a counter-letter; they are the component parts of one and the same contract, the corresponding links of the evidence of that contract.

That a lessee's possession is that of the lessor, that the lessor's title can not be assailed by the lessee, is not, could not, be disputed. In this case, it is manifest the lease was intended as a security for the payment of the balance due on the price of a sale or not less than a promise of sale. It did not impair or destroy, it reiterated and confirmed, when coupled with the counter-letter, the stipulations of the sale.

On the trial, defendant, a son of King, was asked whether he had signed his father's name, with his father's consent, to the counter-letter herein referred to. That question was objected to, on the ground that the authority to sign such a document can be shown but by a written act. The objection was sustained. This was an error. The counter-letter was not the mandate, but the act signed for, in presence and under the instructions of the parent. That authority was delegated for only one object, was not to be exercised out of the interested parties presence, lasted the space of time required to write a name, and expired when the last letter of the principal's name fell from the agent's pen. In such a case, the act itself is the act of the principal, not of the agent.

The witnesses whose names are affixed to some of the documents copied in the transcript, may be able to explain the apparent contradiction in the dates mentioned in the act granting the extension and the act of lease; they and others may prove whether Sherman has built on and

improved the land, when he took possession of the same, and when and under what circumstances that possession ceased.

If plaintiff has not paid the whole of the price agreed upon, he has paid of that price the sum of \$664 64. Though his petitory action may have been premature, his injunction was properly issued, and should have been maintained until the final determination of this controversy, or, if there yet remains due a balance of the price, until the date fixed, according to the pleadings of defendant himself, for the payment of that balance.

We consider as indispensable a new trial of this case.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that this case be remanded to the lower court, to be proceeded with according to law; the costs of the appeal to be paid by defendant.

No. 722.

J. P. WHITE vs. E. A. GIVENS.

In a suit to enjoin a wrongful seizure, and to recover damages on account of it, plaintiff may prove the amount of his attorney's fees, like any other element of damage.

The fact that a debtor has other property than his homestead, or has fraudulently disposed of other property, does not affect the exemption of the homestead, if his condition brings him within the operation of the homestead law.

APPPEAL from the Eleventh Judicial District Court, parish of Bienville. *Trimble, J.* Trial by jury.

J. S. Young and J. C. Egan, for plaintiff and appellee.

L. B. Watkins, for defendant.

The opinion of the court was delivered by

MARR, J. This is a suit to prevent, by injunction, the sale of the homestead of plaintiff, White, seized by the sheriff under execution on a judgment in favor of defendant, Givens, against White, and to recover damages for the unlawful seizure of the land and the growing crops.

Defendant, Givens, in his answer denies that the property is exempt, and he pleads other matters tending to show that White, pending the suit of Givens against him, had disposed of all his property except this tract of land, with the view to defeat the pursuit of his creditor, Givens.

The case was tried by a jury, and upon their verdict judgment was rendered in favor of White for one hundred and twenty dollars damages for the wrongful seizure, maintaining and perpetuating the injunc-

29	571
50	120
29	571
116	224

tion, and declaring the property seized to be the homestead of White and not subject to seizure and sale.

Defendant, Givens, took two bills of exception to the testimony offered on the trial, the first to the proof by White of the "value and contract price of his attorney's fees," on the ground that, in an injunction suit against the execution of a judgment, it was inadmissible to allege or prove attorney's fees in behalf of plaintiff in injunction.

The plaintiff seeks in this suit, not only to prevent the sale of his homestead, but damages for the wrongful seizure. He treats the seizure as unlawful, a trespass, a violation of the right of exemption secured to him by law. He alleges as elements of damage the fees paid his attorney, the loss of his crop, the annoyance to his family, and his loss of time occasioned by the seizure. It is proper in estimating the damages occasioned by an unlawful invasion of the rights of a plaintiff to prove the loss, including the expense which he has incurred in preventing further wrong; and the reasonable fees of an attorney may be allowed as well as any other expense occasioned to the plaintiff by the unlawful act of the defendant.

The second bill of exceptions is to proof by plaintiff, in explanation of a conversation in which he had stated that the judgment in favor of Givens was unjust. This conversation was brought out on the cross-examination, and on re-examination the witness was asked why he had stated, in that conversation, that the judgment was unjust; to which he answered that Givens owed him for four bales of cotton, which overpaid the debt, and that Givens had not given him credit for the same.

It is obvious this entire testimony was wholly irrelevant. The question of indebtedness between Givens and White had been passed upon by this court finally. It was not proper for defendant, Givens, to interrogate White touching the conversation, but, having done so, he could not with any propriety object to the statement by White, on re-examination, of the reasons which induced him to make the statement that the judgment which Givens was seeking to enforce was unjust. Of course, the object of Givens's counsel in proving the conversation was to influence the jury in favor of Givens and against White; and it was the right of White to prevent that effect by stating, as he did, the reasons which induced him to make that statement.

But all this inquiry was wholly immaterial. The real question, the only question except that of damage, was whether the property seized was exempt by law from seizure. It was not necessary, nor was it proper, for defendant to allege or to prove that White, during the pendency of the litigation, had disposed of other property. The law exempts the homestead; and whether the defendant in execution has other property or whether he has made fraudulent or fictitious sales of other property,

White vs. Givens.

it is not material for us to inquire, because the exemption is specifically of the homestead, and that can not be sold under execution whether the defendant has other property or not.

The allegations of the petition and the proof show that the property seized was the homestead of the plaintiff in injunction, White; that he had a wife and four children dependent on him for support; that the tract of land consisted of one hundred and twenty acres; that the whole was not worth two thousand dollars; that he had no other land; and that his wife had no separate property. The case contemplated by law is fully made out by the allegations and the proof; and there is no room for doubt or question that the property seized was exempt within the true intent and meaning of the act of 1865, extra session, No. 33, p. 52.

If White has disposed of his property fraudulently or by simulated titles, that property may be pursued by his judgment creditors; but no act of White, however fraudulent, touching other property can deprive him and his family of the exemption of the homestead.

It seems that Givens was determined to test the right of exemption in this case; for, as he testifies, he gave the sheriff an indemnity bond "for the sheriff to retain the seizure." The seizure was made on the ninth of August. A keeper was appointed by the sheriff; and, although White and his family were not interfered with in the occupation of the dwelling, his custody and control and his enjoyment and right of dominion were necessarily impaired, and could be exercised by him only in subordination to the authority of the sheriff and his keeper. The crops still required work and attention at the time the seizure was made, and this was permanently interrupted by the seizure.

We can not entertain any inquiry as to the policy of this exemption. It is the business of the Legislature to consider and to determine that. The validity of the homestead act is no longer an open question; and we must content ourselves with a mere reference to what we said and decided in April last, in the case of *Wolf & Cerf vs. Mary L. Hardin*.

The seizure in this case was unlawful. It occasioned White, besides seventy-five dollars for attorney's fees, loss and damage to his crops. The amount allowed by the jury, one hundred and twenty dollars, is not excessive, and it is not punitive. We find no cause to disturb the verdict, which is based upon the statements of the witnesses, neighbors of White, who had much better means of arriving at a correct estimate than we can have.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed with costs.

No. 727.

JOSEPH T. SWAN ET AL. VS. MRS. ANN T. GAYLE, ADMINISTRATRIX, AND
WILLIAM T. ATKINS.

The parish court is without jurisdiction of a suit by creditors of a succession brought against a purchaser of a portion of its property at probate sale, to compel him either to pay the adjudicated price of the property, or have it decreed as still belonging to the succession.

A PPEAL from the Parish Court of Ouachita parish. *Slack, J.*

Robert J. Caldwell, R. W. & R. Richardson, and W. W. Farmer, for plaintiffs and appellants.

Cobb & Gunby, for defendants and appellees.

The opinion of the court was delivered by

DEBLANC, J. As creditors of the succession of W. H. Gayle, plaintiffs aver that immovable property belonging to said succession was offered for sale, under order of court, and was adjudicated for cash and on credit to Wm. T. Atkins, one of the defendants, as shown by the *procès-verbal* of the sale, and, besides, by acts passed before the recorder of Ouachita and recorded in his office.

They assail, as unfounded and false, the declaration made in those acts by Mrs. Gayle, as administratrix of her husband's estate, that Atkins has complied with the conditions of the sale and paid her the price of the property adjudicated to him, and they pray that, unless Atkins does comply with the condition of the aforesaid sale, the property adjudicated to him be decreed to belong to Gayle's succession, and, as such, re-advertised for sale.

We are informed by plaintiffs' petition that—since more than two years—Mrs. Gayle has filed an account of her administration, and that, in July, 1875, the Supreme Court has passed on their opposition to that account, but we have not been apprised of the nature of that opposition or of the tenor of the decree.

Two exceptions were filed by Wm. T. Atkins: one to the jurisdiction of the parish court, by which this case was decided; the other, that plaintiffs' petition discloses no cause of action.

Those exceptions were sustained, and plaintiffs have appealed.

They contend that their demand is of a probate character; that the property adjudicated to Atkins has not ceased to be, is now, in the succession of Gayle. Were it so, the jurisdiction of the parish court could not be successfully contested; but, by the judicial admissions already cited, what do we learn? That, under order of a competent court, sales were advertised and made; that at those sales Atkins became the adjudicatee of immovable property; that in the *procès-verbal* of that sale

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and in public acts Mrs. Gayle has acknowledged having received from Atkins the price of said property.

In presence of these admissions, in presence of the violent presumption that, in her final account, the administratrix must have charged herself with the price she owns to have received from Atkins, can we legally maintain that the title to the property and its possession are still in the succession? To reach that conclusion, we would have to disregard the plain letter of the law; for it considers the tradition or delivery of immovables as always accompanying the public act which transfers the property. R. C. C. 2479.

If the price of the property was really paid and appears in the account of the administratrix, she and the sureties on her bond are liable for it. If she did not receive the price and transferred the property, she may be removed, another administrator appointed, and the sale from her to Atkins declared a nullity. She can no longer retard the distribution of that price; her failure to distribute it would of itself justify her removal. C. P. 1013; R. C. C. 1158, 1159.

In argument, plaintiffs' counsel insisted that their object is not to attack or avoid the sales from the succession to Atkins, but to compel the administratrix and Atkins to complete those sales. The contracts, the existence of which is admitted in their pleadings, are not only—in form, at least—complete and recorded, but they are executed contracts, which transfer both title and possession.

This case presents an exceptional feature. The unsworn creditors deny, the sworn representative of the succession asserts, the payment of the purchase price, and those creditors are before us asking that the parish court be instructed to compel the payment of a price which the administratrix declares that the adjudicatee has already made, that she has already received.

If not absolutely unfounded in law, their action is certainly premature. The administratrix is before the court by which she was appointed; she is there with an account of her administration. If that account be correct, the creditors have no cause to complain; if incorrect, they are in the jurisdiction in which it can be disputed, to which they must apply for redress. That redress is, first, by opposition to the account; and, afterward, if it becomes necessary, by removal of the administratrix, by an action on her bond, against her and her sureties, by the appointment of another administrator; and, if then required by the circumstances, by suit to avoid the sales from the succession to Atkins; or, if no price was paid, to have them declared concocted simulations.

The title to the property has passed from the succession, passed under order of court, passed at a sale made at public auction, to the last and highest bidder. That sale was confirmed by acts passed before the

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parish recorder, and the probate court should compel an immediate distribution of the proceeds of those adjudications, or remove the administratrix.

Can we, in advance, take for granted that the repeated declarations of the administratrix that she has received the price of the property are deliberate falsehoods, and, in advance, cancel the purchaser's titles to said property, or decree that such titles are mere nullities, which should be erased from the record? The price—if unpaid—may be in the hands of the vendee as a deposit.

The creditors are not without remedy. They may press the administratrix, compel a classification of their claims, a distribution of the proceeds of the sale. Before the homologation of her account, the administratrix is not authorized to settle with the creditors. When their rank shall be recognized and fixed by a decree of homologation, if she fails to pay their share of those proceeds the parish court would not hesitate to pronounce that she had forfeited her trust and transfer that trust to more faithful hands; and her successor would then inquire whether the price has or has not been paid by Atkins, whether he holds under a real or a simulated title. Until then we can not arbitrarily presume that the administratrix has violated her duty and given away the property of the succession, nor can we arbitrarily presume that any one can imagine that such property, the common pledge of creditors, can be either used or acquired, without a compensation or a price.

There is no error in the judgment appealed from, and it is hereby affirmed with costs.

No. 710.

EVANS & TAYLOR VS. SUCCESSION OF A. M. ETHERIDGE.

20	576
52	66

Evidence to support a motion to dismiss an appeal on the ground of acquiescence of appellant in the judgment, may be filed any time before the case is submitted. If an *issue* is made, as to whether appellant has acquiesced in the judgment, it must be passed on by the lower court before this court will consider it.

A PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Parsons, J.*

Cobb & Gunby, for plaintiffs and appellees.

S. D. McEnery, for defendant.

The opinion of the court was delivered by

SPENCER, J. Plaintiffs and appellees file in this court a motion to dismiss the appeal on the ground that the defendant and appellant has acquiesced in and voluntarily executed the judgment appealed from. This

motion and the facts relative to the alleged execution and acquiescence are supported by the oath of appellant's counsel.

Defendant's counsel files a counter-affidavit setting out a different state of facts and denying the alleged acquiescence and execution voluntary. The record in this case was filed July 2. The motion to dismiss was filed July 3, but inadvertently the affidavit was not signed before filing the motion. The court permitted the counsel to append his signature and take the oath on the seventh. Appellant's counsel urges that the motion must be considered *as filed* on the seventh, when the affidavit was sworn to, instead of the third, when the motion itself was filed. This is too technical, especially when invoked in a case where the affidavit was not signed by a manifest inadvertency. Besides, the law does not say that documents or proofs in support of a motion to dismiss must be filed within three days. In fact, we think that a motion to dismiss on the grounds stated in this one may be made at any time before submission, since the voluntary execution or acquiescence (the grounds of the motion) may occur at any time.

But the affidavit of appellee and the counter-affidavit of appellant raise issues which this court can not primarily try, being a court of appellate jurisdiction only. The issue thus raised must be tried.

It is therefore ordered and decreed that the court *a qua* proceed to try the question whether the appellant has "voluntarily executed" or "acquiesced in" the judgment appealed from, and that its finding and judgment upon that issue be sent up to this court in due course.

No. 475.

SUCCESSION OF GEORGE W. WOMACK.

An administrator who received Confederate money in payment of succession property sold by him, when that money was the currency in general circulation, can only be held for what the money he received was at that time worth in gold.

A PPEAL from the Parish Court, parish of Ouachita. *Baker, J.*

H. P. Wells, for plaintiff and appellee.

Cobb & Gunby, for accountants.

Robert J. Caldwell and *R. W. & R. Richardson*, for opponents.

The opinion of the court was delivered by

WILY, J. In August, 1862, George W. Womack died, leaving a small succession, consisting of movables, inventoried at \$450 70, and immovables, appraised at \$1122 02. Charles Delery was appointed adminis-

Succession of Womack.

trator, and, under order of court, he sold all the movables, except a few articles, for the aggregate sum of \$730 55. In May, 1872, Delery died without having rendered an account of his administration. Mrs. Delery and H. M. Bry, the executors of the last will and testament of Charles Delery, under order of court, filed his final account in the succession of Womack, which was opposed by the heirs at law of the deceased. As to the immovable property tendered by the accountants, there is no controversy, the heirs agreeing to accept. As to the one hundred and fifty dollars Confederate notes, inventoried as the property of the deceased, the administrator need not account, because they were not valid obligations; indeed, they are not property. The administrator is chargeable with the value of a note of the railroad company \$23, specie \$21, and the debt of Weaver on Hunsacker \$20; also with the inventoried value of a bridle \$2 50, not sold or accounted for, amounting in the aggregate to \$66 50; which, added to the proceeds of sale of personal property \$730 50, amounts to \$797 05. From this must be deducted \$402 47, the aggregate amount of debts paid by the administrator or his representatives, leaving a balance of \$394 58 due by the administrator. The objection that the shotgun and part of a barrel of sugar in the inventory are not accounted for is not well founded; they are embraced in the sale of the personal property.

The accountants have the right to charge the succession of Womack with the clerk's costs and the fee of the attorneys in making out the final account, no other fees of counsel having been charged.

The charge of seventy-five dollars for a coffin for the deceased is not unreasonable, and is allowed as an item in the credit herein given.

The item of thirty-six dollars, the amount of expenses in sending Jesse Womack, one of the heirs, to Georgia, is not chargeable to the estate; it is an individual debt due by him, and for which the other heirs can not be charged.

The accountants contend that the personal property sold at Confederate prices and the proceeds of the sale were Confederate notes, therefore the succession of Delery ought not to be condemned to pay over to the succession of Womack the \$394 58, the balance due for and on account of said proceeds. To this the answer is that the proof does not show that Delery received Confederate notes; nor that the court authorized him to do so. But, assuming that the order at the time requiring him to sell the personal property of Womack impliedly authorized him to receive in payment thereof Confederate notes, because there was no other currency, still, to get relief on account thereof, it devolved upon the administrator to tender the identical notes which he received at said sale; and this has not been done.

Suppose an administrator during the war had sold the personal prop-

Succession of Womack.

erty of the succession confided to his administration for Confederate notes, and afterward used said notes in his business, in paying his individual debts, or otherwise invested it, deriving great benefit therefrom, would he be heard setting up as a ground of defense that the proceeds of the sale of the personal property of the succession were Confederate notes, and that he is not responsible to the heirs? We think not.

The three Confederate notes of one hundred dollars each, attached to the record and tendered to the heirs, are not shown to have been the identical notes received by Delery at the sale of the personal property of this succession. Our conclusion is that there should be judgment against the succession of Delery in favor of the succession of Womack for \$394 58.

It is therefore ordered that the judgment of the court *a qua* in favor of opponents for \$118 36 be amended by increasing the amount thereof to \$394 58, and, as amended, that it be affirmed, appellee paying costs of appeal.

The Chief Justice was recused in this case.

ON REHEARING.

The opinion of the court was delivered by

MANNING, C. J. Womack died in August, 1862. Delery became his administrator, and obtained from the court an order to sell his movable property. It was sold, and realized more than its appraised value in the inventory. The bids at the sale were paid in Confederate treasury notes. The debts of the deceased and of his succession were paid in the same currency, and the administrator died before his account was rendered. Delery's executors filed the account of their testator's administration, showing a balance of near three hundred dollars due the heirs of Womack, and they present that amount in Confederate currency, along with the account, averring that they discovered a paper containing an inclosure of that sum among the papers of the deceased, Delery, which was supposed to be the proceeds of the succession sale of Womack. The object of the opponents is to compel the payment of this sum in the present currency of the nation.

There is no imputation of bad faith to the administrator. It is not charged, nor contended, that Delery used the currency received by him at the succession sale for his own purposes, and afterward replaced it by other like currency at a later period. Neither is it disputed that Confederate treasury notes were the only currency in use in the parish of Ouachita at the time of the sale. Objection was made to the admission of proof to establish that fact, but the fact itself is undisputed. A bill

of exceptions states the ground of objection to be that the executor can not be permitted to prove the existence or use of any money in discharge of debts at that time, except United States currency, nor that Confederate currency was the currency of the country at that time, as it was issued in violation of the laws of the United States.

These and similar objections are based upon the idea that courts must shut their eyes and ignore events that have stirred the world to its remotest recesses; that while all humanity has attested its interest in the historical occurrences that were transpiring at that time, judicial blindness must be affected or assumed, as to those occurrences, by those who are called on to determine the legal consequences of the acts of individuals in the midst of these events.

It was properly proved in this case, and was admitted by both counsel, that Confederate money was the sole currency of that part of the country where these proceedings were had at that time, and that this currency was then worth one third its face in gold. The highest judicial tribunal of our country has sanctioned the doctrine of common sense and common honesty which requires that obligations, made under the exceptional *régime* of the Confederate States, should be enforced with due regard to the surroundings of the contracting parties, and in accordance with their manifest intent; and, in assessing their moneyed value, that the value of Confederate currency at the time of the transaction should be the standard that regulates the judgment of the court. *Thorington vs. Smith*, 8 Wal. 1; *Delmas vs. Merch. Ins. Co.*, Wal.

The lower court adopted this rule in the present instance, but there is another element which enters into this case which would entitle the administrator to entire relief if it had not been abandoned. The sale of the movables was a necessity. Witnesses say they or their value would have been lost if they had not been sold. There was but one currency in which the administrator could be paid at that time. The court that ordered the sale knew that. No other money would have been permitted to pass current by the government that dominated the country where these proceedings took place, and the use of force was not needed to effectuate this public policy. A spontaneous and clamorous public sentiment supplemented and supported the financial policy of that government. The administrator could have done nothing but receive the Confederate currency, and there is no pretense that he derived advantage from its use. It perished in his hands. He ought not to be held responsible for it. No appeal, however, was taken by the representative of the succession from the judgment of the lower court, and, besides, relief to that extent was abandoned in the oral argument.

There is error both in the account as stated by the judge *a quo* and by the decree of our predecessors. The railroad note, the specie, and the

 Succession of Womack.

Hunsacker draft, were all charged against the administrator on the account rendered for him. They were included in the inventory, and the gross sum of the assets as therein appraised was charged against him, as well as the excess above that, realized by the sale. The item of thirty-six dollars expended in sending one of the heirs away is not chargeable to the common fund, but should be deducted from his distributive share of the estate.

The account is thus re-stated:

Assets, exclusive of land not sold	\$730 55
Debts paid, less item of \$36	349 47
	<hr/>
	\$381 08

which is reduced to \$127 02, the proportion in value of the Confederate currency to gold being three to one.

It is therefore ordered, adjudged, and decreed that the judgment heretofore rendered be set aside, and that the judgment of the lower court be amended by inserting \$127 02 as the balance due the heirs by the administrator, instead of the sum therein stated; and, further, that the distributive portion thereof to which Jesse Womack is entitled be charged with thirty-six dollars paid for his individual use, and as thus amended that the judgment of the lower court is affirmed, the opponents and heirs to pay costs of appeal.

No. 740.

A. R. BOOTH VS. THE CITY OF SHREVEPORT.

The consent of a municipal corporation to a contract may be as effectually given by the action or inaction of the common council, as by a formal resolution of the council.

A PPEAL from the Tenth Judicial District Court, parish of Caddo.
Looney, J.

Nutt & Leonard, for plaintiff and appellee.

T. Alexander, City Attorney, for defendant.

The opinion of the court was delivered by

DEBLANC, J. Plaintiff claims from the city of Shreveport the sum of \$583 33, which he alleges to be the balance due him on his salary as officer of the Board of Health of said city, from the first of November, 1874, to the first of June, 1875.

It is conceded and proved that plaintiff was elected health officer; that his salary was fixed by the aforesaid board at one thousand dollars per

annum; that he performed the duties appertaining to his office, and that the board has no funds applicable to his claim.

Defendant denies any liability to plaintiff, and rests its defense on one of the sections of the act of the Legislature creating the Board of Health for the city of Shreveport, which declares that in case the funds arising from the collection of fees and fines, as provided in the act, are insufficient to meet all the necessary expenses of the Board of Health, then such deficiency shall be paid by the city of Shreveport, "provided said expense is incurred with the consent of the municipal authorities of said city." Act No. 142 of 1874, section thirteen.

In the language of the statute, has the expense incident to the appointment of the health officer been incurred with the consent of the municipal authorities of Shreveport?

Up to November, 1874, each monthly installment of plaintiff's salary was paid by the city, with the consent and approval of its council. In December, 1874, at the first or second meeting of the council during that month, plaintiff, as he had done before, presented his account for approval. In his declaration on the trial, referring to what transpired on that occasion, he said: "My account was tabled, and from that time the council has refused to pay my salary."

This action was taken by the council elected and installed in the city of Shreveport in November, 1874. Of that newly-elected council not a member had belonged to the preceding one.

From the evidence in the record, plaintiff was twice appointed as health officer, the last time on the nineteenth of December, 1874. The date of this appointment is shown by an extract from the proceedings of the Board of Health; as to the date of the first, we are left to infer.

In December, 1874, immediately after his second appointment, plaintiff was informed—by the council's action in regard to his account—that his salary would no longer be paid by the city of Shreveport, and that—if given at all, and howsoever given—the sanction of the previous council of that expense and of its payment was then withdrawn.

With that notice, he accepted the office, discharged the duties imposed by his acceptance, and for his compensation, from the date of that notice, he must look and apply to the Board of Health.

Until the first of November, his accounts were invariably approved and paid by the city. Were not these approvals and payments the highest expression of the council's consent that the expense should be incurred? The counsel for the city contends that the consent of those who represent a corporation can be evidenced but by a resolution of the common council.

To sustain this too broadly stated proposition, he refers to the decision of this court, in the case of *H. N. Seibrecht, Syndic, vs. the City of*

Booth vs. the City of Shreveport.

New Orleans. In that case the court was not called upon to construe a special statute, one limited in its effects to a fraction of the State; in this, we are, and we must construe it according to its own provisions.

What are those provisions? "If the funds arising from the collection of fees and fines are insufficient to meet all the necessary expenses of the Board of Health, such deficiency shall be paid by the city of Shreveport," and, here, the condition indispensable to bind the city is clearly stated: "The expense referred to can be incurred but *with the consent* of the municipal authorities."

The consent is a mere operation of the mind; it is manifested by words either written or spoken, by action, inaction, or silence. Whatever may be the form of its expression, when expressed it has the effect which the law attaches to it. The statute under consideration does not qualify the consent to be given; it did not, and we can not, distinguish; where there is no qualification, no restriction, we can not presume or legislate either a qualification or restriction.

The payments by the city of Shreveport of the monthly installments of plaintiff's salary were, as long as they were made, ample warrant to continue performing the duties of his office, a silent promise, an absolute consent, to pay for his services. That promise and consent were revoked in December, 1874.

For his services before that revocation, and from the first of November, defendant is liable.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be and it is hereby annulled, avoided, and reversed. It is further ordered, adjudged, and decreed that plaintiff do have judgment against and recover of the city of Shreveport \$83 33 $\frac{1}{4}$, with legal interest thereon from the twelfth of April, 1876, and the costs of both courts.

Mr. Justice Egan took no part in the decision of this case.

No. 760.

MRS. NANCY E. TALLY VS. WILLIAM HEFFNER, SHERIFF, ET AL.

Property purchased during marriage in the joint names of husband and wife is *community* property, although paid for with the wife's paraphernal funds.

A PPEAL from the Tenth Judicial District Court, parish of Caddo.
Boorman, J.

D. M. C. Lliham, Duncan & Moncure, and N. C. Blanchard, for plaintiff and appellant.

Land & Taylor and William H. Wise, for defendants and appellees.

The opinion of the court was delivered by

DEBLANC, J. Mrs. Nancy E. Tally claims to be owner of the undivided

half of lot No. 8, in block No. 50, in the city of Shreveport, which she alleges she acquired jointly with her husband and paid for with her separate paraphernal funds.

She also claims as belonging to her the buildings and improvements which are now on the undivided half of the lot, which she considers as her separate and paraphernal property, the most of which were thereon placed and paid by her husband; and paid, as shown by the evidence, with funds of the community.

The whole of lot No. 8 was, by plaintiff's husband, mortgaged to the tutor of the minor Wilcox and to the Life Association of America. Under these mortgages the property was seized and advertised for sale. Mrs. Tally opposed the sale, but without giving bond. The sale was made, and the property adjudicated, one half to the tutor of Wilcox, the other half to the Life Association of America.

Shall Mrs. Tally's opposition be sustained, and those adjudications annulled? The title on which she relies either justifies or defeats her opposition.

On the nineteenth of January, 1859, she and her husband purchased from the succession of W. W. Smith lot No. 8 of block No. 50. The deed from the administrator recites that "the sale is made to Martin Tally and wife," that the price was paid, *without stating by whom*.

The partnership or community between husband and wife consists, among other things, "of the estates which they may acquire during the marriage, either by donations made jointly to both, or by purchase, even although the purchase be only in the name of one of the two and not of both, because the period of time when the purchase is made *is alone attended to*, and not the person by whom it was made. R. C. C. 2402.

That article fixes the general rule. How has that article been construed by this court? Though the title be taken in the name of only one of the spouses, or in the names of both, the law classes as common property that acquired during the marriage.

To that rule what are the acknowledged exceptions? As to the wife, the property is paraphernal when it is transferred to her as a *dation en paiement*, or when the title to the property is taken in her own name, by herself or her agent, and paid for with her paraphernal funds, administered by her without the assistance of her husband. 24 An. 295; 7 An. 92; 4 R. R. 117; 10 An. 606; 17 L. R. 300.

The intention, on the part of either of the spouses, to acquire a separate title, to exclude the acquired property from the marital partnership, must be clearly expressed, can never be presumed, and why? Because it would be to presume against an adverse, a legal, presumption.

Neither in law nor in fact can a joint purchase be regarded as a separate purchase. Under the first, the property passes to the community,

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and, at least as to third persons, neither of the spouses can be allowed to contradict the recital of their own act, and to show that the joint purchase evidenced by the act was, as to one of them and as to a portion of the property, a separate purchase, one by which they intended to acquire a separate title to the undivided ownership and undivided possession of an undesignated fraction of a whole, sold to and jointly purchased by the husband and wife.

The joint purchase by those who compose the matrimonial partnership vests the acquired title, not in one of the partners and the community, but in their partnership, and this though the price of the property be paid with the separate funds of either of the spouses. 4 R. R. 117; 17 L. R. 300; 10 L. 180; 1 R. R. 367; R. C. C. 2334.

To be a notice to third parties, to put them on inquiry, the separate purchase in the name of the wife must be recorded as required by law; but this is not all; the recorded act must contain the declaration that the property was paid for with her paraphernal funds, and that, at the date of the sale, those funds were under her separate administration, or that the sale was a "*dation en paiement*" from her debtor to her, in satisfaction of a paraphernal claim. 12 R. R. 579; 8 An. 286; 20 An. 531 and 532.

Without that declaration, the fact that the title was taken in her name does not raise even a presumption in her favor, and leaves unremoved, unimpaired, the presumption that the acquired title passed to the community. When made in the act, that declaration, though not conclusive against the creditors of the community, is a notice to them. 7 An. 326; 20 An. 531; H. D., vol. 1, p. 883, Nos. 7, 8, and 10.

Plaintiff contends that one of the defendants was put on inquiry by the fact that the title to the property was in the name of the husband and wife; and how? One of the counsel representing the association went to plaintiff's husband and asked him to explain the appearance of his wife's name in the title-deed. The husband answered "he did not think it would make any difference; that the property belonged to the community." The counsel replied that he so believed.

That declaration was objected to, and should have been excluded. It was the dead husband's declaration, made out of the presence, and against the interest of the wife, in a suit to which he had been but a nominal party. Its admission or exclusion could neither add to nor impair and weaken the presumption invoked by defendants.

Plaintiff attempted to prove by her own and the testimony of other witnesses that "she bought in her name, for her own use and benefit, and paid for with her paraphernal funds, when under her administration, lot No. 8 of block No. 50."

To the reception of that testimony defendants objected, on the grounds—

Mrs. Nancy E. Tally vs. Heffner, Sheriff.

First—That plaintiff had not alleged that, at the date of her purchase, she had the administration of her paraphernal effects, or that she was separate in property from her husband.

Second—That, if received, said testimony would contradict the declarations contained in an authentic act, and substitute for recorded stipulations different and secret stipulations.

Their objections should have prevailed; plaintiff and defendants rely on but one and the identical deed; that deed was duly recorded, and became a notice to the world. It transferred the property to the community, not to the wife; and private agreements which are not recorded did not, could not, to the prejudice of the creditors of the community, divest its acquired and recorded title, or any parcel of that indisputable title.

The marked ability of her counsel has alone, but for an instant, upheld plaintiff's unfounded and defenseless pretensions.

There is no error in the decree appealed from, and that decree is affirmed with costs.

Rehearing refused.

No. 731.

MEYER, WEIS & Co. vs. WILLIAM T. ATKINS.

Novation is not presumed, but if the surrounding circumstances clearly indicate that the intention of the parties was to novate a debt, it will be so held. After the dissolution of a commercial partnership, the power of its former members to bind each other by note, can only arise by express mandate.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Parsons, J.*

R. W. & R. Richardson, for plaintiffs and appellees.

W. W. Farmer, for defendant.

The opinion of the court was delivered by

DEBLANC, J. Defendant is sued on a note signed by D. B. Trousdale, and indorsed by Miss E. A. Trousdale and I. Lee Pettit. That note does not bear the signature of defendant, and, on mere inspection of its form and recitals, no one could imagine that Atkins is bound *in solido* for its amount, either as drawer, indorser, or otherwise.

Plaintiffs allege that said note was subscribed and delivered by the commercial firm heretofore trading in Monroe under the style of "D. B. Trousdale," and composed of said Trousdale, Atkins, and Pettit, for a claim due them by said firm. The existence of that partnership, and—

while it existed—its liability to plaintiffs for an account, now represented by the note sued on, are acknowledged by defendant.

He contends, however, that the original claim of plaintiffs against their partnership has been novated, and that, in lieu of that claim, they have accepted another, a different obligation—a note secured by indorsements and mortgage.

“Novation is not presumed; to convert a partnership debt into the separate debt of the partners, the intention to do so must clearly appear. There must be a deliberate and mutual assent of creditor and debtor to such conversion. Nay, more; a partnership creditor may take the separate liability of a partner, without necessarily extinguishing the partnership liability. In such cases courts will look to the parties’ intention, as deducible from all the circumstances.” 6 An. 521.

In the perusal of this record, our attention has stumbled from exception to exception.

To the litigant, the law is a weapon or a shield; to the court, a landmark and a guide. Its rules should be neither enlarged nor contracted. Justice would be but an empty name if a judge could hesitate to remove a technicality to seek the parties’ intention, to ascertain what was proposed and what accepted, the character of the proposition, the character of the acceptance; to link together the circumstances, the motives, the causes which have united two or more wills on a common purpose.

Were it necessary to do so, for the enforcement or protection of the parties’ rights, we would have discussed and passed upon the validity or invalidity of their exceptions; but, whether we consider or disregard that part of the evidence which was objected to, we can, it seems, reach but one conclusion.

What are the facts? A commercial partnership was formed in Monroe; its style was “D. B. Trousdale;” the members who composed it are those we have already mentioned. It was dissolved in the month of December, 1872, and, when dissolved, was indebted to only two parties, one Bloom, and plaintiffs firm. Those creditors were immediately informed of the dissolution of said partnership.

It was after that dissolution, after they had been informed of that fact, that Atkins proposed to give them, in settlement of their claim, a note to be executed by Trousdale and secured by mortgage on his, defendant’s, land. Plaintiffs wrote to him to obtain his consent to indorse the note alluded to. This he positively refused to do, and replied “*that he would give nothing more than the mortgage.*”

The note was subscribed, the mortgage granted. In form and in substance they are the note and mortgage proposed by Atkins. He sent them to plaintiffs, who took them without objection, brought suit on them, and,

in conformity with Atkins's agreement and their tacit acceptance of that agreement, prayed for and obtained a judgment ordering, as to him, the sale of the mortgaged land, and condemning, *in solido*, the drawer and indorsers of the note to pay its amount.

Their counsel were not informed when they brought that suit that Atkins had been a member of the firm of D. B. Trousdale. Had they been aware of it, he would have been sued; but, beyond the mortgage, he was not liable, and could not be personally held for any balance of the debt in excess of the proceeds of the mortgaged property. Their counsel's course was the only legal course that could have been pursued under the special circumstances which surround this case.

The partnership was bound for plaintiffs' claim. Until the note and the mortgage were taken by them, the partners were responsible *in solido* for the payment of said debt; but how can it be justly contended that now the partnership, or those who composed it, are responsible, in a capacity which had ceased to exist before the date of the note and of the mortgage? Up to December, 1872, the signature "D. B. Trousdale" was both that of a partner and the partnership; from that time, to the knowledge of plaintiffs, it was the signature of the individual.

A partner's power to bind his copartners by note or by acknowledgment, or to use the social name, ceases with the dissolution. Any subsequent power is derived, not from the previous relations of the parties as partners, but from a new contract, one of mandate, and that must be express and special. A confession of judgment, after the dissolution, binds only the party making it. 2 An. 772; 8 L. 568; 5 R. R. 174; 6 R. R. 70; 4 An. 276; Edwards on Bills and Notes, p. 113.

"The partnership having been dissolved, and the proper notice thereof given, the presumed agency of a partner to bind the firm while acting during the scope of the business, is thereby revoked, and he can make no new promise or engagement in the name of the firm, even though he only changes, without increasing, the prior obligations of the partners. The power to settle and adjust the concerns of the firm does not carry with it the authority to sign an account stated, to indorse, or renew a note in the name of the partnership." Edwards on Bills and Notes, p. 117 and 118.

The partnership had been a failure; its safe and portfolio were empty; its credit was lost, and, to its creditors, the note, with its indorsements and the mortgage, were as unexpected wrecks cast to the shore by the sea after the disaster. They renounced the barren solidarity of an insolvent partnership for the personal security of each of the partners.

They could have enforced their claim against all or any one of the partners. This we admit; but, during the litigation, the debtors might have so protected their property against it, that the litigation would have

been as fruitless as expensive to the creditors, who, in their own interest, have exchanged an account for a note, a chance for a reality.

There is not, on or in that note, a sign, an expression, indicating the least intention of reserving the original liability of the partnership, or to attach to the new obligation the solidarity abandoned or destroyed by the last transaction, which, if not expressly accepted, was ratified by the creditors.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be and it is hereby annulled, avoided, and reversed. It is further ordered, adjudged, and decreed that plaintiffs' demand be and it is hereby rejected at their costs in both courts.

No. 625.

THE STATE VS. ROBERT NUNN.

An indictment which fails to conclude with the words "against the peace and dignity of the same," i. e., the *State*, is fatally defective.

A PPEAL from the Eleventh Judicial District Court, parish of Lincoln. *Trimble, J.* Trial by jury.

Robert T. Vaughn, District Attorney, for the State.

J. C. Egan, for defendant.

The opinion of the court was delivered by

SPENCER, J. The defendant was indicted, tried, and convicted of murder, and sentenced to death. He has appealed.

The record in this case discloses an almost reckless disregard of the forms of law and the rights of the prisoner. It is admitted —

First—That no counsel was assigned to him until after his arraignment and plea, and after the twelve jurymen had been called into the jury-box, and the first one called up to be sworn.

Second—That the prisoner was brought into court in irons, and kept so during the entire trial.

Third—That after trial and conviction application was made for new trial, alleging the above grounds, and moreover the discovery of new evidence of a most material character, after trial. It was admitted that this evidence was unknown to the prisoner or his counsel at the time of trial. It was also admitted that the prisoner was an ignorant colored man, and supposed and believed that he had an attorney to whom he had in due time given a list of important witnesses; that the attorney had not caused summons to issue for them, because he regarded his employment as only conditional.

The court refused him a new trial.

The prisoner thereupon filed a motion in arrest of judgment, on the

ground that "the constitution of the State (article seventy-nine) requires that all prosecutions shall conclude 'against the peace and dignity of the same,' i. e., of the State. That the indictment in this case concludes 'against the peace and dignity of the —. Robert T. Vaughn, District Attorney, Eleventh District, La.'"

A number of errors on the face of the record are assigned, which it is unnecessary to mention.

The motion in arrest should have been sustained. The indictment is fatally defective in not concluding as required by the constitution, which is peremptory and mandatory. 10 An. 195. But, under the verdict of guilty, on so grave a charge, we can not direct the discharge of the prisoner, and will order him to be retained in safe custody until the next session of the grand jury.

It is therefore ordered, adjudged, and decreed by the court that the sentence and verdict appealed from be set aside and annulled; and it is now ordered that the motion in arrest of judgment be sustained, and the indictment set aside and quashed; and it is further ordered that the prisoner, Robert Nunn, be held in safe custody until after the next term of the grand jury of the parish of Lincoln, to answer such charge as may be preferred against him.

No. 762.

JULIUS LISSO VS. THE PARISH OF RED RIVER.

29 560
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Where an act of the Legislature authorizes a parish to issue its bonds for a certain purpose, in such form and denomination as the police jury of the parish may prescribe, the police jury must specifically authorize the issue of such bonds, and in default of this action of the police jury, all bonds issued under color of said legislative act are invalid.

Political corporations are not bound by the unauthorized acts of their agents, when the mandates of the latter are of record, or embodied in a statute.

A PPEAL from the Seventeenth Judicial District Court, parish of Red River. *Chaplin, J.*

The opinion of the court was delivered by

MANNING, C. J. The plaintiff sues upon four bonds with their coupons, a copy of one of which is as follows:

\$500 00. No. Three.

STATE OF LOUISIANA, PARISH OF RED RIVER.

Parish bond for the purpose of paying for the building of a court-house, and for other purposes.

It is hereby certified that the parish of Red River is indebted unto bearer in the sum of five hundred dollars, which sum the said parish agrees to pay in current money of the United States, at the office of the parish treasurer, to the said bearer in one year from the date hereof,

Lisso vs. the Parish of Red River.

with interest at the rate of eight per cent per annum, payable semi-annually on the first day of November and May in each year, on the delivery of the interest coupons attached at the office of the parish treasurer.

For the performance of which the faith and credit of the parish of Red River is pledged by Act of the General Assembly, approved March 4, 1872. Witness the signatures of the president of the Police Jury and the treasurer of the parish of Red River, May 1st, 1872.

[Seal]

M. H. TWITCHELL,
President of the Police Jury.

JULIUS LISSO, Treasurer.

On the reverse of the bond is printed an act of the Legislature, under authority of which it purports to have been issued.

The defendant excepted to the suit on four grounds, the second and third of which were ordered to be taken as part of the answer, and a separate answer was made, denying the authority of the president of the police jury to issue the bonds, or that they were in existence at the time of the pretended sale of them. The grounds of exception thus referred to are—

“Second—Because the bonds were not issued by authority of said police jury as provided for and contemplated in said statute.

“Third—Because no public ordinance, as required by law, was passed by said police jury, authorizing the issue of said bonds; nor was any ordinance passed determining and ascertaining the rate of taxation necessary to raise the fund to pay said bonds and the interest thereon as required by said statute.”

The second section of the act of March 4, 1872, reads thus:

“That the bonds shall not exceed in amount the sum of twenty thousand dollars, or so much thereof as may be necessary, and shall be of such denomination and form as the police jury may prescribe. They may be sold under the direction and control of the police jury on the most advantageous terms.”

The act contemplates some action on the part of the police jury ordaining that the bonds shall be issued, fixing the denomination and quantity of them (limited by the maximum total mentioned in the act), and also prescribing their form. The jury never passed any ordinance of that kind. The act of the Legislature conferred upon the police jury the power to do these things, but that body never exercised it. The only ordinance that was passed relative to the matter was one providing for the advertisement and sale of the bonds, as follows:

“Be it enacted by the police jury of Red River parish that the president be and is hereby authorized to cause to be advertised, sold, and delivered according to law, as the interests of the parish may require, the bonds of the parish authorized by act No. 13 of the session of 1872.”

The minutes of the jury show this ordinance received its sanction May 20, 1872.

The bonds, for the sale of which provision is thus made, had no existence, since no act had been done by the jury to call them into being. This ordinance was an ante-natal destination of them to sale and delivery. Certain papers, having the form of bonds, had been signed by the president of the police jury, and by the parish treasurer, who is plaintiff here in his personal capacity, but they neglected to obtain the sanction of that body, or to have it prescribe what the Legislature had empowered it to do. These papers are not the bonds of the parish. No valid bonds could be issued without the authority of the Legislature. That authority having been given, none could be valid unless issued in conformity to the directions of the legislative act.

Police juries are political corporations, whose powers are especially defined, and they can not exercise any others than those delegated to them.

"It is a general and fundamental principle of law that all persons contracting with a municipal corporation must, at their peril, inquire into the power of its officers to make the contract; and a contract beyond the scope of the corporate power is void, although it be under the seal of the corporation. So, also, those dealing with the agent of the corporation are likewise bound to ascertain the nature and extent of his authority. This is certainly so in all cases where the authority is special and of record, or conferred by statute." Dillon's Municipal Corporations, vol. 1, sec. 372.

"The general principle of law is settled beyond controversy, that the agents, officers, or even city council of a municipal corporation can not bind the corporation by any contract which is beyond the scope of its powers, or is entirely foreign to the purposes of the corporation. * * The duties and powers of the officers or public agents of the corporation are prescribed by statute or charter, which all persons not only may know, but are bound to know. * * * It results that unauthorized contracts are void, and in actions thereon the corporation may successfully interpose the plea of *ultra vires*, setting up as a defense its own want of power under the charter, or constitutional statute, to enter into the contract." Dillon's Corp. sec. 381.

The plea here is that the bonds now held by the plaintiff were unauthorized by the corporation; that they were not issued pursuant to any ordinance passed by it, and that the police jury had never adopted any ordinance directing that a court-house should be built, and providing for the issuance of bonds to pay for the building thereof, and this plea is supported by the proof.

Judgment affirmed.

No. 700.

THE STATE vs. JOHN B. MCCOY.

The law which directs a change of venue on the naked application of the district attorney is constitutional.

The verbal reservation of a right to file exceptions, made by an attorney, in a case before a district court, is of no effect.

The accused in one case can not avail of an exception to the venire filed by the accused in another case.

When he is neither "personally interested" in the case, nor connected by blood or marriage with a prisoner arraigned before him, the judge must, on being *re-cused*, appoint a lawyer of proper qualifications to sit in his stead.

The affidavit of an accused that an absent witness would prove that his life was threatened by the deceased, and that he killed deceased in self-defense, is not ground for a continuance.

Threats of deceased against the accused, are not admissible in evidence, until it be first proved that the accused had been advised of them.

A PPEAL from the Ninth Judicial District Court, parish of Rapides.
A. Bowman, Judge *ad hoc*. Trial by jury.

Edwin G. Hunter, District Attorney, for the State.

M. Ryan, *H. L. Daigre*, and *A. Cazabat*, for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. Defendant was indicted in the parish of Grant for murder. On motion and affidavit of the district attorney a change of venue was ordered to Rapides parish, where the accused was tried and convicted of murder, without capital punishment, and accordingly sentenced to hard labor for life. He prosecutes this appeal, and presents by bills of exception for our decision various grounds for the reversal of the sentence :

First—That the court erred in granting the change of venue upon the simple application of the district attorney, without proof.

The act of 1868 does not require proof where the district attorney applies for the change, but makes it obligatory on the judge to grant it. In this case the district attorney swore to the facts stated by him, and to the necessity of the change. The change of venue was ordered in January, 1876, and no subsequent legislation should be construed as vacating that decree. This act of 1868 is not in conflict with the constitution, so far as we can see. Article six guarantees a trial by a jury of the parish, "unless the venue be changed." The Legislature was and is free to declare when and how the venue may be changed. This is what it did by said act.

Second—*H. L. Daigre*, one of defendant's counsel, on the first day of the term offered to file on behalf of one White and one Jones (who stood indicted before the court) a motion to set aside the venire, which the judge refused to permit him to do, because he had not paid his license. Thereupon he excepted. On trial of this case against McCoy said attorney

offered to file therein his said bill of exceptions taken in the cases and on behalf of White and Jones, stating that he had verbally reserved the right to file said bill in all cases in which he was counsel.

The court did not err in refusing this application. The district court is a court of record, and verbal reservations of the sort referred to can not be noticed. Defendant McCoy has no right to complain of the court's rulings in the cases of White and Jones, with which he had no connection. If he thought the venire illegal, he should on the first day of the term have filed or offered to file his motion to quash it. He did not do so.

Third—That the court erred in calling R. J. Bowman, an attorney at law, to preside in the trial of this case. The facts are that after the indictment of McCoy his attorney, W. F. Blackman, was elected judge of the ninth district. Judge Blackman entered an order in this case recusing himself on the ground that he had been of counsel for defendant, and appointed Bowman, an attorney of his court, to try the case. Defendant excepted to Bowman's appointment, and contends that, under article ninety of the constitution, an attorney can not be appointed to preside in the trial of a criminal case. That article reads as follows:

"In *any case* where the judge may be recused, and where he is not PERSONALLY interested in the matters in contestation, he shall select a lawyer having the qualifications required for a judge of his court to try such cases. And when the judge is PERSONALLY interested in the suit, he shall call upon the parish or district judge, as the case may be, to try the case."

It would be difficult to frame a law in more general terms than this: "*In any case* where the judge may be recused, and where he is not personally interested in the matters in contestation, he shall select a lawyer," etc. "When the judge is personally interested in *the suit* he shall call upon the parish judge," etc. The provisions of section 1068 of Revised Statutes apply only where the judge "is connected by blood or marriage with the prisoner." So that the interpretation of article ninety of the constitution contended for by defendant would leave the case, where the recused judge was not personally interested, and not related by blood or marriage, totally unprovided for. We can not adopt such a view. We think the appointment of an attorney to preside is clearly legal. If the law requires the attorney so appointed to take an oath as judge *ad hoc*, we must presume that it was done. The point is only raised in the brief of counsel. The record does not show that an oath was not taken. *Omnia presumuntur rite acta.*

Fourth—The accused made affidavit for continuance on account of the absence of certain witnesses, and stated therein what he expected to prove by them. Among other things stated as provable by said wit-

nesses was that "said Radeski (the deceased) by his threats and conduct against affiant rendered the danger to his (affiant's) life actual and imminent, and that the killing of Radeski was unavoidable and necessary to preserve his own life, and the killing done in self-defense."

The court ordered this part of the affidavit to be stricken out, and thereupon the State admitted the truth of all the other allegations of the affidavit, and the court then overruled the application for continuance, and the trial proceeded. Defendant excepted. We think the reasons assigned by the judge *ad hoc* sufficient. He says: "The question whether the threats and conduct of the deceased rendered the danger to the life of the prisoner imminent is a question which must be determined by the jury from the words and actions of the deceased constituting those threats and that conduct, and not from the assertions of the witnesses; that the threats and conduct did render the danger imminent is a legal question growing out of certain facts, and not a fact itself. The question whether the killing of Radeski was unavoidable, and necessary to preserve the prisoner's life and done in self-defense is the very issue submitted to the jury; a legal question to be determined by them and not by witnesses under the semblance of giving testimony, and that the State could not be required to admit legal questions as evidence."

Fifth—The counsel for prisoner asked a witness: "Did you hear the deceased, Radeski, make, on the day of the killing, any threats against the life of the accused?" Objection being made by the State, the court offered to permit the prisoner to ask witness if he had ever communicated to him, the prisoner, any threats made by the deceased;" and if the witness answered affirmatively, then to allow the question propounded to be put. The prisoner refused to put the preliminary question proposed by the court, and then the court sustained the objection, and prisoner excepted.

"It is well settled that antecedent threats by the deceased against the accused are not admissible in evidence, unless it appears that they were communicated to the accused. Their admissibility depends upon this as a condition precedent; and as their admission would be illegal without this necessary concomitant proof of communication, we think that the court may well refuse to admit them until this necessary foundation is laid, just as courts refuse to admit the testimony of deceased or absent witnesses until the death or absence is proved." State vs. Gregor, 21 An. 473.

Sixth—The prisoner also excepted to the charge of the judge, which was as follows:

"If you are conscious that you know what the law is upon any point that may arise in your deliberations, it is your right and your duty to follow your own constructions, even though they may differ from the

legal opinion of the court upon that point, but if you feel conscious that you are ignorant of what the law is upon the point in question, it is your duty to follow the law as stated by the court, and to ask its instructions upon points of which you are ignorant. The law never intended in making juries judges of the law that they should substitute ignorance for knowledge, nor for juries to decide that to be law which they in their conscience feel that they know nothing about. Although you are not lawyers, the law presumes that you have learned the law of this case from the law which has been expounded to you on the trial. But knowledge is something tangible and definite, and you must be conscious that as such you possess it whenever you differ from the court upon a point of law."

The objection to this charge can not be that it is too restrictive of the power of juries. While fully, and perhaps too fully, conceding the jury its powers as judges of the law and fact, it wisely and properly cautions them against substituting their ignorant fancies and personal wishes for conscious knowledge and application of legal principles as bases of decision.

Seventh—In *the brief* of counsel for accused, it is stated that it is assigned as error on the face of the record that the accused was not arraigned as required by law. We find no assignment of errors filed in the record, and even if the statement in the brief sufficed, the counsel has not advised us wherein the defect of arraignment consists; and an inspection of the transcript has failed to reveal it to us. We conclude, therefore, that there is no error in the verdict and sentence appealed from; and

It is therefore ordered and decreed that the same be affirmed with costs.

CONCURRING OPINIONS.

DEBLANC, J. In this case the district attorney applied for a change of venue, on the ground that the State could not obtain a fair and impartial trial in the parish of Grant, because of the prisoner's popularity among some of the population and their almost universal determination and assertions that they would acquit him.

The State officer swore to the truth of these facts, and his declaration stands uncontradicted.

For that reason I am of the opinion that the change of venue was properly allowed, but I do not believe that, on the naked application of either the Attorney General or a district attorney, the judge is authorized to change the venue to another parish without proof that a competent

State vs. McCoy.

jury of the parish, wherever the offense is charged to have been committed, can not be had.

The constitutional rule is that "the accused shall be entitled to a speedy public trial by an impartial jury of the parish in which the offense was committed." The change of venue is the exception to that rule.

Unless it is alleged and established that an impartial jury of the parish can not be had, a change of venue, against the will of the accused, is a dangerous violation of the constitution, as, otherwise, that constitutional privilege of a prisoner, his life, his liberty, and reputation would be at the mercy of the district attorney or Attorney General.

I concur in the decision read by Mr. Justice Spencer, and reserve the right of hereafter filing a separate opinion on the question above alluded to.

EGAN, J. I concur in the views expressed in the foregoing concurring opinion of Mr. Justice DeBlanc. The uncontradicted affidavit of the district attorney in the matter of change of venue, though unusual, sets forth a very sufficient state of facts in the present case to warrant the order made.

No. 701.

ELIZABETH EDWARDS AND HUSBAND VS. M. A. EDWARDS, ADMINISTRATOR, ET AL.

Where the matter in dispute is over five hundred dollars this court has jurisdiction. The sufficiency of a surety on an appeal bond will not be considered here when not put at issue, or passed on in the court below.

In a suit to annul a judgment, brought within a year from the date of the judgment, the judgment can not be pleaded as *res adjudicata*.

An attorney at law has no authority, unless specially empowered by his client, to confess judgment for the latter.

A confession of judgment by a married woman, which condemns her to pay her husband's debt, is null and void.

Parol evidence is admissible to show that property seized at the suit of a community creditor belongs to the wife.

A PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Parsons, J.*

Cobb & Gunby, for plaintiff and appellant.

Garrett & Garrett, for defendants.

The opinion of the court was delivered by

SPENCER, J. On the fourth of November, 1873, M. A. Edwards, administratrix of D. L. Edwards, obtained, by confession, judgment in the

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107	147
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124	504

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parish court against W. S. Stutson, plaintiff's husband, for some \$220 on his note dated December 1, 1870. On the twenty-eighth of March, 1871, M. T. Edwards and wife sold, by notarial act, to their daughter, the plaintiff, the eighty acres of land in controversy in this suit, stating the price to be \$1000 cash received. On the twenty-third of November, 1871, said plaintiff, Elizabeth Stutson, by notarial act, acknowledged to have received from her father and mother \$1500 in cash as an advance on her inheritance.

M. T. Edwards and wife had eight children, four majors and four minors. About the same dates as above they made to each of the three other majors (of whom D. L. Edwards was one) similar acts of sale of land, and took from each of them similar notarial receipts. They also sold and transferred to their minor children property of equal value.

M. T. Edwards died in 1872, and his widow, Adeline Edwards, qualified as tutrix of the minors.

In January, 1875, M. A. Edwards, administratrix, issued a *feri facias* against W. S. Stutson, on said parish-court judgment, and caused the eighty acres of land so conveyed by the father and mother to plaintiff to be seized as community property.

A suit was thereupon brought in the name of the plaintiff in the district court of Ouachita, claiming the land as her paraphernal property, and enjoining its sale for the husband's debt. The affidavit for injunction was made by Stutson, the husband, as agent of his wife, the plaintiff, and the petition was signed by Stubbs & Stone, attorneys. On the sixteenth of March, 1875, the attorneys for plaintiff and the attorney for defendants in that injunction suit (which was numbered 1216) made an agreement whereby it was stipulated that the case would be continued by consent until the September term following, on the condition that if Stutson shall on or before that time pay the amount of the enjoined judgment, then said injunction suit to be discontinued at plaintiff's costs, otherwise, "there shall be judgment therein dissolving the injunction at plaintiff's costs," and directing the sheriff to proceed with the sale of the property, the sale not to be made before the first Saturday of January, 1876. On the fourteenth of September, 1875, this agreement was filed in the cause, and on the eighteenth judgment was entered up according to its stipulations, dissolving the injunction without damages, and staying the sale till the time agreed upon. The land was thereupon again advertised for sale on the fifth of February, 1876, and part of it adjudicated to one Wood, said to be the father of defendant, M. A. Edwards, the remainder not sold for want of bidders. On the fifteenth of February, 1876, this present suit was brought, reciting in substance the above facts, praying the nullity of said judgment of the eighteenth of September, 1875, also the nullity of the sale to Wood, and to be decreed owner of the

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property as paraphernal, and to enjoin its sale for the husband's debts, etc.

The defendant first pleaded in defense the judgment in said suit, 1216, as *res adjudicata*, which was by the then judge overruled. Defendant then answered, reiterating the plea of *res adjudicata*, and claiming that the property, having been bought after marriage, by the wife, was community property. The case was tried at the May term, 1877, and the judge then presiding rendered judgment for defendant, sustaining the plea of *res judicata*, dissolving the injunction, and directing the sheriff to proceed to sell under the *fi. fa.* against the husband.

Plaintiff appeals. There is a motion to dismiss the appeal on two grounds: first, because this court is without jurisdiction *ratione materiæ*; and, second, for insufficiency of the surety on the appeal bond.

The matter in dispute is the ownership of the land (which is clearly shown to be over five hundred dollars by the deed to plaintiff and the uncontradicted allegations of her petition under oath) and to validity of a judgment subjecting the same to the husband's debts, and to annul a sale of part of it. We clearly have jurisdiction. As to the sufficiency of the surety on the appeal bond, this court can not notice the objection, because it is a court of appellate jurisdiction only. No objection to the sufficiency of the surety *on the appeal bond was made, or tried*, in the court below. True, the same party was surety on the injunction bond, and a rule was taken to dissolve for insufficiency, but it does not seem to have been passed upon by the court below. The proofs taken on that rule would not enable us to say, if we had the right, whether the surety was good or bad at the time of the appeal.

The motion to dismiss is overruled.

On the merits, there are but two questions:

First—As to the validity of the judgment of the eighteenth of September, 1875, and as to its effect as the thing adjudged.

Second—As to the property being the separate paraphernal estate of the wife.

First—The judgment in suit No. 1216 was rendered on the eighteenth of September, 1875. This suit, to annul it, was instituted on the fifteenth of February, 1876, less than six months after its rendition. A judgment which is attacked by action of nullity within one year can not be pleaded as *res adjudicata* to the suit for nullity. Otherwise, the action of nullity would be a farce and a mockery, since the existence of the judgment attacked (which alone gives the right and the occasion to the action of nullity) would be itself a bar to proceedings to annul it. In other words, the same fact, to wit: *the existence* of the judgment, would be at one and the same time the *foundation* and *destruction* of a right of action.

We do not agree with defendant's counsel that plaintiff's remedy to avoid the said judgment was by appeal or motion for new trial. She did not know, perhaps, of its rendition until the time for new trial had elapsed, and the grounds of nullity alleged are matters *dehors* the record, and could not, therefore, be brought to the knowledge of the appellate court. Plaintiff attacks the judgment on the ground that the attorneys had no authority from her to consent to it, and acted without her knowledge or consent. This is fully proven by her oath, which defendant makes no effort to contradict. These attorneys were practitioners before the court trying the cause, and, we think, the fact that they were not called by defendant to prove their authority from her, and to contradict the plaintiff's oath, is strongly corroborative of its truth. We accept it as true.

Article 2997 of the Civil Code is too clear to require other citation of authority to establish the proposition that an attorney at law has not, *as such*, authority to confess a judgment "to acknowledge a debt" "to compromise or refer to arbitration," or "to make a transaction in matters of litigation."

Besides, it is the well settled jurisprudence of this State that a married woman can not, so as to bind her, or her property, confess a judgment for a debt of her husband or of the community. See 3 N. S. 498; 2 An. 3, 806; 12 An. 350; 14 An. 165; 15 An. 628. There is no dispute as to this debt being that of the husband and community. What the wife could not do herself, she could not authorize her attorneys to do for her. So, we are brought to the only remaining question, was the land seized in this case the paraphernal property of the wife and plaintiff?

The evidence shows, if admissible, that such was the fact, beyond any doubt whatever. In fact, the defendant does not even venture to contradict it, but relies solely upon the legal presumption resulting from the acquisition by the wife being made after her marriage, and upon technical objections to the evidence offered by her. Leaving aside the parol evidence in this case, the deeds and conveyances themselves, whereby these old people, M. T. Edwards and wife, conveyed to each of their children properties of equal value, and, subsequently, took their several receipts in authentic form, for equal amounts, as advances on their successions, leaves no shadow of doubt in our minds that the sale to Mrs. Stutson by her father and mother of the land in controversy was in fact a donation to her, as an advance, and that the receipt given by her a few months afterward to them for fifteen hundred dollars embraced the one thousand dollars stated as the price of the sale. The parol evidence offered fully proves these facts, and was properly admitted. Evidence going to show the connection between the act of sale and the subsequent receipt does not contradict either act. Plaintiff simply alleged and proved that the

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sum stipulated as the price of the sale to her was in fact the same identical sum for which she gave her receipt.

The plaintiff prays for damages. Had she offered proof of their amount we should award them to her, for we are strongly impressed that the defendant, Mrs. M. A. Edwards, widow and administratrix of D. L. Edwards, plaintiff's brother, and himself a recipient and holder of property under the same terms and conditions as plaintiff, has acted in bad faith in this proceeding, and in knowing disregard of her sister's rights.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and it is now ordered, adjudged, and decreed that the plaintiff, Elizabeth Edwards, be declared owner in her own right of the land described in her petition in this case, and that the defendants be perpetually enjoined from disturbing her possession thereof; that the judgment of the eighteenth of September, 1875, in the suit No. 1216 on the docket of the district court of Ouachita parish, be annulled and avoided, and that the sale to William Wood by the sheriff, of date fifth of February, 1876, under execution, enjoined in said suit No. 1216, be and the same is annulled and rescinded. It is further ordered and decreed that defendants be condemned *in solido* to pay the costs of the court below and of this appeal.

Rehearing refused.

No. 694.

THE STATE VS. JAKE THOMAS.

An indictment charging an act, with intent to commit murder, which does not aver that the act was "willfully and feloniously" done, is fatal.

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125	811

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. *McVea*, J. Trial by jury.

W. N. Potts, District Attorney, for the State.

W. F. Kernan, for defendant.

The opinion of the court was delivered by

EGAN, J. The defendant was indicted, tried, found guilty, and sentenced to three years imprisonment at hard labor in the penitentiary. After an ineffectual motion in arrest of judgment, he has appealed. The charge, as stated in the indictment, is that he did, with force and arms, "shoot one George Washington with a dangerous weapon, namely, a shotgun, with intent to commit murder, and to murder aforesaid George Washington, contrary to the form of the statute," etc. The ground set

forth in the motion in arrest and the error assigned is that the indictment does not charge that the accused did the acts charged "feloniously, willfully, and with his malice aforethought." At common law this indictment would be bad, and Wharton's American Criminal Law, section 399, lays it down that the use of the word "feloniously" is essential to all indictments for felony, whether common law or statutory. Again, section 372 of the same author says that where a statute refers to a common-law offense by its popular name, and proceeds to impose a penalty on its commission, it is, of course, insufficient to charge the defendant with the commission of the offense in the statutory terms alone, while under the Virginia statute against attempts to commit offenses, the same authority says it is not enough to say "the defendant attempted to maim;" the particulars of the attempt must be set forth. In same section, §293 says "the weight of authority now clearly is that an indictment for attempting to commit an offense must show on its face facts which would make an attempt in point of law, or at least should so individualize the offense as to secure the offender from a second conviction." While it is true that even at common law it was not necessary to charge an *attempt* to commit a crime or offense with the same particularity and minuteness as the *commission* of the crime or offense, it was always held necessary in such an indictment as that under consideration, at least whenever done "with felonious intent," and, indeed, it would seem with "malice aforethought." Archbold's Criminal Pleadings, p. 62, side paging 50; same, p. 531, side paging 447; see, also, same, p. 422 and 423, and Chitty's Criminal Law, vol. 3, p. 828. It is, however, claimed that as the law now stands in Louisiana such allegations in an indictment, even for murder itself, are unnecessary, since the statute of 1855 and Revised Statutes of 1870, and the cases of the State vs. Phelps and Brown, 24 An. 494, and State vs. Toney Forney, 24 An. 191, are relied upon in support of this view. Of the former of these cases, it might be sufficient to remark that the indictment which was held good charged expressly that the defendants "*did willfully, maliciously, and feloniously kill, slay, and murder,*" and that Howell, Justice, dissenting, adhered to the doctrine announced in the State vs. Heas, 10 An. 195, which, as well as the uniform current of previous decisions, held as essential in an indictment for murder the words "with malice aforethought" as not being an "unnecessary prolixity" in the meaning of the statute. See, to similar effect, Territory vs. Nugent, 1 M. 117 and 175, and State vs. Kennedy, 8 R. 602; 9 An. 211; State vs. Stiles, 5 An.; to the effect that whatever has been determined to be essential averment in an indictment at common law will be deemed necessary here, "and that the power to remedy the evil lies in the legislative branch of the government."

State vs. Thomas.

In the cases of the State vs. Cook, 20 An. 145, and State vs. Durbin, 20 An. 408 (both for robbery) the court held that the statute of 1855 was not intended to make a radical change in the system of criminal pleadings, but to simplify it and correct some supposed deficiencies, and that the essential, substantial averments in a bill of indictment required by the common law are not dispensed with by the act of 1855, and that the omission of the term "feloniously" in the indictment was held to be fatal.

It is singular that the court altogether overlook, in the State vs. Phelps and Brown, 24 An. 494, the important fact that section 1048 of the Revised Statutes of 1870 provides that "it shall be sufficient in an indictment for murder to charge that the defendant '*did feloniously, willfully, and of his malice aforethought, kill and murder the deceased,*'" and in every indictment for manslaughter to charge that the defendant "*did feloniously kill and slay the deceased.*" These provisions are precisely those of the act of 1855, and clearly indicate that it was not the legislative intention to dispense with them, which, as was well said by Judge Hsley, the organ of the court in State vs. Cook, are precisely the important facts charged in the indictment according to the English form (quoting Archbold's Crim. Plead., 314).

It is hardly necessary to add that by the act of 1805, of 1855, and the Revised Statutes of 1870, it was provided that all crimes, offenses, and misdemeanors shall be taken, intended, and construed according to the common law, and that the forms of indictments (divested of unnecessary prolixity) the method of trial, rules of evidence, and all other proceedings in the prosecution of crimes, offenses, and misdemeanors ('changing what ought to be changed') shall be according to the common law, unless otherwise provided."

The cases cited in this opinion, and those referred to in them, give judicial interpretation to the words "unnecessary prolixity" and "changing what ought to be changed" under the statute. The essential averments of a good indictment at common law are not classed under either head. The case of the State vs. Toney Forney, 24 An. 191, was an indictment "for shooting with intent to kill and murder while lying in wait," and charged the act to have been done "*willfully, feloniously, and maliciously.*" The extent of the ruling of the court was that the offense was sufficiently charged in that language under the statute, without the use of the words, "with malice aforethought." None of the words "*willfully, feloniously, or maliciously,*" found in that indictment, appear in the indictment in the present case, which does not, therefore, come within the authority of that case, even admitting it to be consistent with the former rulings of this court. Whether, therefore, it was essential to use in that

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indictment the words "with malice aforethought" or not, we are of opinion that the omission of the words "willfully and feloniously" is fatal.

It is therefore ordered, adjudged, and decreed that the judgment be arrested, that the verdict and sentence appealed from be annulled, avoided, and reversed, the indictment quashed, and that the defendant remain in custody to await the finding of a new bill of indictment by another grand jury of the parish of East Feliciana.

No. 764.

JOHN A. HUNTER ET AL. VS. R. T. BUCKNER & BROTHER ET AL.

If the real owner of property allows it to stand recorded in the name of another, by a title translativ of property, he puts it in the power of that other to create a valid mortgage on it.

APPEAL from the Seventeenth Judicial District Court, parish of Red River. *Pierson, J.*

L. B. Watkins, for plaintiffs and appellants.

Land & Taylor and *William H. Wise*, for defendants.

The opinion of the court was delivered by

MANNING, C. J. John A. Hunter, Virgil A. Stewart, and William B. Stewart allege that the first two purchased the Wray and Boland plantation, under a bond for title, from W. E. Wamsley, on the fourth of January, 1871, the price being seven thousand five hundred dollars, which bond erroneously recites that \$3983 19 were paid in cash, the residue being provided for by the execution of three notes of equal sums, payable respectively on the tenth of November, 1871, and the same day of the two following years, and that this sum, thus represented to have been paid cash, was not in fact thus paid, but as follows:

On the same day that plaintiffs executed the notes to Wamsley, a conveyance of the Loggy Bayou plantation was made to him by William B. Stewart, Alice M. Stewart, and Martha S. Caldwell, for the expressed consideration of \$3519 08 cash, and that this sum was not in fact paid in cash, but in reality was a part of the slightly larger sum mentioned as cash paid in the bond for title of the Wray and Boland plantation.

The petitioners further allege that in August, 1873, Wamsley instituted suit upon the three notes above mentioned, praying for judgment for their aggregate amount, and for the enforcement of his vendor's privilege, and a judgment with a restraining condition as to execution was rendered against them, as will appear by that case, now before us on appeal.

29	604
44	883
29	604
48	874
29	604
51	1472
29	604
109	922

But meanwhile, viz., on third of April, 1873, Wamsley had executed a mortgage upon the Loggy Bayou tract to R. T. Buckner & Brother to secure the payment of his debt to them, amounting to \$2197 29, and they had obtained executory process thereon, and that tract was advertised for sale on February 17, 1877. Besides, Wamsley had never paid for the Wray and Boland tract, and his vendors foreclosed their mortgage upon it, and it was sold on the second of December, 1876, for a sum insufficient to pay their mortgage, and Hunter and Virgil Stewart were consequently evicted.

The plaintiffs allege that Wamsley's failure to lift this mortgage is a breach of the condition of his bond, and operates a revocation of the sale of the Wray and Boland tract to Hunter and Virgil Stewart, and entitles the plaintiffs to the payment of the penalty of the bond, and that the revocation and resolution of the sale of the Wray and Boland tract entitles them to recover back the Loggy Bayou tract free from every incumbrance that Wamsley may have placed upon it, and particularly from the Buckner mortgage. They then pray the annulment of that mortgage, and its erasure from the mortgage records, and for the revocation of the sale of the Wray and Boland tract through the enforcement of the resolatory condition, and a decree declaring void any sale that may take place under the Buckner mortgage.

An exception was filed by the Buckners.

First—That Hunter and Virgil Stewart have no interest in the suit to annul the sale of the Loggy Bayou tract, but that such suit should be by all the vendors of that tract, and not by one alone.

Second—That no legal cause of action has been set forth in the petition against the Buckners, inasmuch as they are third parties, who were ignorant of, and are unaffected by, any latent equities between others.

This exception was referred to the merits, and there does not appear to have been any other objection to either the misjoinder or nonjoinder of parties.

The Buckners answered by a general denial, with the allegation that they are holders of a special mortgage upon the Loggy Bayou tract, acquired by them in good faith and in ignorance of any secret bargains between their mortgageor, Wamsley, and his vendors or others, and believing, and having a right to believe, that Wamsley was the legal owner of the mortgaged premises.

Wamsley's administrator, answering for the succession, pleaded the judgment in the other suit upon the notes as *res adjudicata*. There was judgment for the defendants.

The plaintiffs' documentary evidence included the bond recited in the petition, and the deed to Wamsley of the Loggy Bayou tract. The first is an instrument by which Wamsley binds himself to Hunter and Virgil

Stewart in the penal sum of seven thousand five hundred dollars, and is dated January 4, 1871. The condition is that, whereas Wamsley has that day sold and delivered the Wray and Boland tract for seven thousand five hundred dollars (the vendees not mentioned), of which sum \$3963 19 is paid cash in hand and receipt acknowledged, and three notes of equal amounts are given for the residue by Hunter and Virgil Stewart, with W. B. Stewart as security, now if the two makers of the notes shall pay them, then Wamsley shall make or cause to be made a good title to this land to those makers. No other document was signed by these parties. The notes were never paid, and a formal act of sale was never executed.

The deed from William B. Stewart, Alice M. Stewart, and Martha S. Caldwell to Wamsley of the Loggy Bayou tract recites that the consideration, viz.: \$3519 08, was received, and is acknowledged before the signing and delivery of the deed, and the title is warranted. This instrument has no date, and is not signed by Wamsley, but neither of these omissions is noticed or objected to by counsel on either side. Appended to this deed is the affidavit of one of the subscribing witnesses to the genuineness of the several signatures, which was made before A. J. Twitchell, recorder, on the fourth of August, 1871. The plaintiff did not offer any writings or certificates upon the back of the deed.

The defendants offered the Buckner mortgage, and the indorsement that it was recorded on April 14, 1873; also, the "certificate of the recorder of the date of registry" of the Loggy Bayou sale, thus supplying that writing or indorsement which plaintiff had not included in his offering; that is to say, the note of plaintiffs' evidence shews that he offered the deed to Wamsley, and the note of defendants' evidence shows that he offered the certificate upon that deed; and the clerk states this latter is designated No. 2. But there is no document No. 2 in the transcript. The certificate which the defendants offered is copied, however, in the plaintiffs' evidence immediately after the deed, and is necessarily the one offered by them. It is as follows:

"I hereby certify the above and foregoing to be a true and correct copy of the original, duly of record in my office book A conveyances, folios 18 and 19. Given under my hand and seal of office this fifth day of September, 1876;" and then follows the recorder's name.

The deed of the Loggy Bayou place has then no date. Its execution was proved before the recorder August 4, 1871. There is no certificate of the date it was recorded; but on the fifth of September, 1876, the recorder makes a copy of it, and certifies that it is of record in a certain book, on a certain page. When was it recorded? The defendants say, certainly before August 7, 1871, because the bond of Wamsley was recorded on that day in book A, page 41, and the certificate shows the

deed to Wamsley was recorded in book A, page 18, *ergo* the deed was recorded before the bond, since it is on an earlier page. The misfortune of this demonstration is that there are two books A, and the deed was recorded in page 18 of the Conveyance Book, while the bond is certified to be recorded on page 41 of the Mortgage Book.

The whole case turns upon this. This minute elaboration is only excused by the importance of ascertaining the date of the registry. We are enabled to ascertain that it was before another given date thus.

The public acts of the Legislature shew that the parish of Red River was created March 2, 1871. The deed was proven before the recorder August 4 following, and it was recorded on page 18 of the first book of conveyances; and was therefore one of the earliest recorded deeds. Wamsley's title was therefore on record long before his mortgage to Buckner of April, 1873.

We are now enabled to apply the law to this state of facts. Parol testimony was offered to prove that the recitals in the deed and the bond, that certain moneys which were part of the consideration of the one, and the whole of the consideration of the other, were not paid in fact, but that the Loggy Bayou tract was estimated at the sum expressed in the deed, and was exchanged for the Wray and Boland tract of larger value, the difference being represented by the small cash payment and the three notes. The evidence was rejected.

It is of no consequence to the outside world what the contract really was between Wamsley and these parties. The only matter that third persons are concerned with, is to know what Wamsley and his vendors say that the contract is. There was on the public records, and in its proper place, an act of sale by which a title, translativ of property, was conveyed to Wamsley of a certain tract of land, the price of which was acknowledged to have been paid in full, and he was in possession of it. He mortgaged that land to a *bona fide* creditor to secure his debt. There is no pretense of fraud, or simulation, or collusion, or bad faith, nor is there any knowledge alleged or brought home to the creditor, of the secret purposes or understandings of these numerous parties, if indeed such existed, and he can not be affected or injured by them.

It was superfluous therefore to hear testimony which could not affect Buckner's mortgage. But we are told that this suit is to enforce the dissolving condition of a sale for non-payment of the price, which being accomplished, the thing sold will revert to the vendors free from all charges created by the vendee.

The resolatory or dissolving condition is implied in all commutative contracts, and its effect is to restore matters to the status that existed at the date of the contract. Civil Code, articles, 2040-41, new numbers 2045-46; Chretien vs. Richardson, 6 Annual 2. So, too, if the price of a con-

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tract had not been paid, it would be competent to the parties as between themselves to shew it. *Barry vs. Insurance Company*, 11 Martin, 630. But these indisputable rules of law neither conflict with, nor do they weaken, that other rule which binds a party to suffer the consequences of his own word or deed, rather than inflict an injury upon an innocent person who has been deceived by him.

It is begging the question therefore to say that this sale must be dissolved for non-payment of the price, since the truth was that it was not paid. The act of sale informed the world it was paid, and the Buckners, acting on that information, gave credit to the owner of the property, and are entitled to enforce their mortgage upon it.

This disposes of the numerous issues which obscure the case, and justifies the judgment of the lower court.

Judgment affirmed.

No. 756.

JOHN W. CARNES VS. THE PARISH OF RED RIVER.

A law which has for its object to change the mode of executing judgments is merely remedial, and does not impair the obligation of contracts. The law regulating the execution of judgments which is in force at the time judgment in a particular case is rendered, must govern in that case.

A PPEAL from the Seventeenth Judicial District Court, parish of Red River. *Pierson, J.*

L. B. Watkins and *C. E. McDonald*, for plaintiff and appellant.

J. F. Stephens, Parish Attorney, and *Elam & Sutherlin*, for defendant and appellee.

The opinion of the court was delivered by

MANNING, C. J. The plaintiff was sheriff of the parish of Red River, and in that capacity had rendered services, such as keeping and maintaining prisoners while in jail, transportation of convicted felons to the penitentiary, arrest of persons charged with crime, *per diem* allowance for waiting on the court, etc. His accounts of these charges had been certified by the clerk of the court to be correct, and had also the approval of the judge. Revised Statutes, 1870, section 2776. Demand was then made on the parish treasurer for payment, which was refused, because there was no money. This suit is to enforce payment, and to compel the assessors to assess forthwith such tax as may be necessary to pay the judgment which may be rendered. The petition was filed April 30, 1877.

The defendant pleads a general denial to the moneyed demand, and

alleges the unconstitutionality and invalidity of the law, which requires a judge to order the assessment and collection of a tax for the payment of a judgment, *idem* (sections 2628-30), and also the repeal of that law.

There was judgment in favor of the plaintiff for the sum claimed, and the court refused to order the assessment and collection of a tax for its payment. The plaintiff appeals.

Those sections of the Revised Statutes of 1870 which direct a judge to order the assessment and collection of a tax to pay a judgment were repealed on the tenth of April, 1877. Acts 1877, p. 87. The repealing law does not provide that it shall go into effect from and after its passage. It takes effect therefore from its promulgation, and all laws are considered promulgated in the parish of Red River thirty days after their publication in the State gazette. Civil Code, article 6. The publication in the official journal will be presumed to have followed immediately upon the passage of the law, unless the contrary be shown. The judgment in this case was rendered on the second of June, at which time the repealing law was in force in that parish.

The appellant regards as unconstitutional this attempted deprivation of his right to have an assessment and collection of a tax ordered by a court at the same time a judgment is rendered in his favor, and for the purpose of paying that judgment, because it impairs the obligation of a contract.

The distinction has now become familiar between laws that impair the obligation of contracts and those that modify or alter the remedy for the enforcement of the obligation. A law which regulates the form of judicial proceedings is remedial in its character. If, before a final decision in such proceedings, a new law intervenes which changes the form, such law will operate upon them. The mode of executing a judgment belongs to the future, and a new law will govern it. *Dean vs. Carnahan*, 7 new series, 259; *Cooper vs. Hodge*, 17 La. 476; *Frey vs. Hebenstreit*, 1 Rob. 565.

That the law which empowers or directs a judge to order the assessment and collection of a tax to pay a judgment has reference to the remedy, is apparent. There was a remedy prior to the act of 1869, when for the first time this power was conferred upon the judge. That act appears in the last revisal of the statutes in the sections quoted. The act of 1877 which repeals those sections merely takes away from the judgment creditor of a parish a remedy that he never had until 1869, deprives him of a mode of enforcing his judgment, peculiar and exceptional in kind, and dependent for its continuance upon the legislative will.

The plaintiff, however, insists that the repealing law of 1877 can not affect his judicial proceeding, because his suit was instituted on April 30, and that law had no effect in that parish until in the following month.

It is the law that is in force when the remedy is about to be applied that controls. When the court rendered judgment on June 2, the power to accord the plaintiff the peculiar mode of enforcing it, which he had demanded in his petition, no longer existed.

Our law at one time permitted executory process on foreign judgments. An order of seizure and sale was taken under it, and the law was repealed before the process was completely executed. Held, that the remedy was extinct. *Scott vs. Duke*, 3 Annual, 253; *Com. Bank vs. Markham*, *idem*, 698. Therefore,

It is ordered and decreed that the judgment of the lower court is affirmed with costs.

No. 769.

L. A. WEBRE vs. WILLIAM WILTON.

In a contest for an elective office all of the relevant facts of the election will be scrutinized by the court, and all legal evidence tending to show who was the real choice of the suffragans, or who *would* have been, under an honest execution of the election laws, is admissible.

Except when the prescription of an election-law is that a thing shall be done in a certain way, and not otherwise, it will be construed as merely directory.

The disregard of a merely directory provision in an election-law, will not invalidate an election held under that law, if such disregard has not admitted the votes of disqualified, nor excluded the votes of qualified voters, nor clothed the result of the election in doubt.

The failure to return the result of a certain poll, within the time prescribed by law, does not of itself authorize the rejection of the vote of that poll.

Votes fraudulently cast, and those of disqualified persons, must be rejected.

Votes cast at a place clandestinely selected by a supervisor of election, and inconveniently remote from the polling-place legally fixed, and published, must be excluded from the count.

The object of all laws regulating elections is under our system to secure the great end of carrying out the popular will; and courts of justice will interpret them so as to secure and not to defeat that end.

A fundamental principle of American and Louisiana law is, that it is the casting of the ballots, unimpeded by force or fraud, which determines the result of elections. The police regulations made to secure that result are merely subsidiary to it.

It is in the power of no officer or set of officers to substitute their own will for that of the people, and whenever it is attempted, it is the duty of the courts, when properly appealed to, not only to enter upon the inquiry, but to undo the wrong and award the right.

A PPEAL from the Fifteenth Judicial District Court, parish of Lafourche. *Beattie, J.*

Clay Knobloch, J. S. Billiu, and Isaiah D. Moore, for plaintiff and appellant.

W. J. Q. Baker, for defendant.

The opinion of the court was delivered by

EGAN, J. This is a contest for office. The plaintiff claims to have received a majority of the votes cast for the office of sheriff of the parish

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of Lafourche at the general election in November last, and that he was legally elected sheriff at said election; but that, notwithstanding, his opponent, the present defendant, who was defeated at the polls, he fears and alleges will be returned elected and put in possession and enjoyment of the office and its emoluments through fraud and other ill-practices on the part of the supervisor of registration, the commissioners of election, and other officers and persons. There are numerous other allegations, and these frauds and irregularities are set out in numerous specifications, some of which are general and some more minute and particular. Among them are that the supervisor, a Republican, opposed in politics to petitioner and his party, failed to give public and general notice of the polling-places and the names of commissioners; that he failed to appoint Democratic commissioners at any of the voting-places as required by law, although professing to so intend and to have done so; that he informed the Republicans of the location of the polling-places several days before the election, and concealed them from the Democrats until twenty-four hours before the election, too late to notify the people in the country in a parish ninety miles long and many parts of which are otherwise accessible slowly and with difficulty; that he issued false and fraudulent certificates of registration, upon which persons voted at the election; that he repeatedly promised and as often failed to strike from the registration list, when called upon to do so, the names of voters who had died, who had removed from the parish, who were convicts, minors, or otherwise not qualified to vote; that votes were polled under the names and numbers of such dead or removed voters by other persons in sufficient numbers, together with the other frauds and illegalities charged, to change the count of votes to his prejudice; that the supervisor did not provide tally-sheets, sealing-wax, writing-material, etc., necessary for the use of the commissioners at Democratic polls, and did not even send ballot-boxes to some of them; of which failure and fault he attempted to and did subsequently take advantage, to the prejudice of the petitioner; that he failed to appoint any polling-place in one of the justice's wards, as required by law, where there were at least forty or fifty Democratic votes, of which petitioner was deprived in the election thereby; that one poll (seventeen) was not held at the place fixed by law and the supervisor, but at a place one and a half or two miles distant, in a private place, a negro quarter, remote from the public road, and without notice to the Democrats, or even to those of them residing on the plantation, or even to the proprietor; that the election at that poll, seventeen, was begun before daylight in the morning, was conducted exclusively by Republican commissioners and against the protest of the United States supervisor of registration, and of Democratic voters, who, after the election had been going on for some time, discovered by accident

where it was being conducted, but refused to vote at an illegal voting-place for fear of losing their votes; that said poll seventeen as returned was exclusively Republican, and was returned and counted as such and in favor of the defendant and against the plaintiff to the number of eighty-six votes; that a large number of colored voters, who desired to vote and would have voted for petitioner and the Democratic ticket, were prevented from doing so by intimidation and fraud; that there were many other acts of fraud and illegality on the part of the supervisor, the commissioners of election, and other Republicans, whereby it was attempted to defeat the will of the people and the election of the petitioner and to declare his opponent elected, when not so in fact; that the supervisor illegally and fraudulently rejected and refused to compile or count the votes from two polling-places (Nos. 2 and 10), at both of which the election was conducted fairly and peacefully, and at which petitioner and the Democratic ticket received a large majority of the votes polled, sufficient, if counted, to have given the return of the election in his favor and against the defendant; and, finally, that by means of the several frauds, illegalities, and ill-practices charged petitioner and the Democratic ticket generally will be illegally deprived of a majority in the count, compilation, and return of the votes of the parish of Lafourche, which, as he alleges, was and always had been a Democratic parish, by a large majority, and was so at the late election.

It is proved that, after conference with Republican leaders, at which he was asked if he could carry the parish for the Republicans, and *he replied that he would do what he could*, one Ledet, a Republican, was appointed supervisor of registration in the place of Panalle, an honest colored Republican, who was called upon to resign under pretexts the falsity of which is shown. From the moment of his appointment Ledet lent himself to the fraudulent purposes of his party and those to whom he owed his appointment, and in every way possible endeavored to prevent a fair election in the parish, and the polling of the full Democratic vote, instead of discharging his duty under the law as a public officer.

The record is full of details of the most unblushing usurpations, frauds, deceits, and other ill-practices and illegal acts resorted to by the Republican supervisor and his associates and advisers in order to carry the parish in favor of the Republican ticket and against the Democratic ticket and the plaintiff, and to make count and compilation and return of the votes in the same way.

These things had grown so common and were habitually practiced with such immunity under the recent rule in Louisiana that they excite no surprise in the mind of any one familiar with the history and conduct of elections in this State for the last few years. Such practices on the part of those charged with the conduct of elections has latterly been

a stepping-stone to preferment and fortune, instead of consigning their authors to a just punishment. Under pretext of preserving the purity and freedom of elections, the whole machinery for their management had become converted into a means of defeating the popular will, instead of carrying it out, and as a means of keeping in place and power a set of corrupt men whose sole object was personal advancement by any and all means, however vile, and not the public good.

The district judge has exhibited his learning and research to show the enormity of the offenses committed by those who sought to guard against these frauds and ill-practices and to detect and expose them when committed. The acts themselves which provoked this espionage, as he terms it, and their authors have been passed over by him in silence. They seem to have provoked from him neither censure nor remark. It may be very true, as remarked by him, that the ballot should be kept sacred and secret. That such is the general design of the law is beyond question; but, while severely censuring those citizens of standing and character (as shown by the evidence) who were engaged in the enforced effort to prevent or expose fraud and illegal voting and practices, it seems entirely to have escaped the district judge that the means of removing from the ballot the veil of secrecy was afforded by those who, for their own purposes and in order to prevent freedom and independence in voting, had placed such marks upon their tickets and those of their political friends, and had made them so distinguishable that not only was it impossible for the ignorant and easily-intimidated colored voter to escape detection if he attempted to vote for his white Democratic friends in whose capacity and fair-dealing he had confidence, but that the most ordinary observer could readily distinguish the character and political complexion of the ballots. Those who voted such tickets did so with full knowledge of the object, and must be considered as having given their consent to the exposure of their votes, so that by all authority no objection could attach to proof of the fact.

That an independent record of the names of voters should have been kept by the United States supervisor was simply the performance of a legal duty, and if that record could be made a check, as it was designed to be, upon corrupt officials whose habitual practice it was to use, as in this case, the police regulations for the conduct of elections as a means of defeating their ends, it is hardly a warrant for the severity of the censure in which it pleased the district judge to indulge in his opinion in this case.

It seems to us a misuse of the eminent authority from which he quotes, and one against which those from whom he quotes would protest, to make them, instead of a protection to the independence of the individual voter, *a means of defeating the will of the body of voters!*

There are not wanting among the utterances of those eminent judges and authors others to the effect that the whole object of all laws regulating elections is, under our American system, to secure the great end of carrying out the popular will, and the fact that contests for office are provided for by law presupposes, what has always been practiced in such cases, an inquiry and the introduction of evidence as to who rightfully obtained or would have obtained at a legal, fair, and peaceful election a majority of the votes. 12 An. 239, 366; 13 An. 301; 27 An. 507. How can this be done without proving, by any legal evidence, for whom the suffragans cast their votes?

A fundamental principle of American and Louisiana law is that it is the casting of the votes or ballots, unimpeded by force or fraud, which determines with us the result of elections. The laws, the police regulations, which are or should be always framed to secure fair elections and a fair polling, count, and report of the votes, are merely subsidiary to that end, and, while they should be observed and considered, they are of themselves of far less importance than the end to be attained. It is in the power of no officer or set of officers to substitute their own will for the votes and will of the people, and wherever this has been done it is the duty of the courts where properly appealed to not only to enter upon the inquiry, but to award the right and undo the wrong, and, if need be, to punish the guilty.

In *Auld vs. Walton*, 12 An. 139, the language of the court is: "The sovereign in this land is the people, and the ballot the expression of the sovereign will. The audacious criminal who lays the hand of violence (and, we may add, fraud) upon the ballot-box in effect usurps the sovereignty of the country. Whenever, therefore, a case of such attempted usurpation is presented, the tribunals charged with the jurisdiction of contested elections should avail themselves of every legal means within their reach to ascertain whether the popular will has been expressed through the ballot-box; and, if so, what it has decreed."

There is an essential difference between the act of voting and the police provisions to secure the evidence of the act. The principle that if the votes be deposited the object of the election is attained, and its validity can not be affected by the non-observance of the directory provisions of the law, has been often disregarded in Louisiana of late years, as it was in this instance. But these principles are well settled in the jurisprudence of our sister States and our own, and have been recognized and announced by the courts, not only as constituted before the war, but by our immediate predecessors in the case of *Burton vs. Hicks*, 27 An. 507. See 9 An. 577; 10 An. 732; 13 An. 301; 8 N. S. 67; 14 Barb. 259; *Cooley's Const. Lim.* 618. The same author says, page 625: "It is to be constantly borne in mind that the point of inquiry is the will of the electors as manifested by their ballots."

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The various provisions of the statute under which the election of November last was held, however often they have been misinterpreted or disregarded, were by their terms and declared intent simply designed to protect and keep pure the ballot and secure its legitimate results. On the subject of the conduct of elections Judge Cooley says (Const. Lim., pages 617 and 618): "Election statutes are to be tested like other statutes, but with a leaning to liberality in view of the great public purposes which they accomplish; and, except where they specially provide that a thing shall be done in the manner indicated, *and not otherwise, their provisions, designed merely for the information and guidance of the officers, must be regarded as directory only*; and the election will not be defeated by a failure to comply with them, provided the irregularity has not hindered any who were entitled, from exercising the right of suffrage or rendered doubtful the evidences from which the result was to be declared." Again the author says, page 618, referring to the leading case of *People vs. Cook*, 14 Barb. 259: "It was said in the same case that any irregularity in conducting an election, which does not deprive a legal voter of his vote, *or admit a disqualified voter to vote, or cast uncertainty on the result, and has not been occasioned by the agency of a party seeking to derive a benefit from it, should be overlooked in a proceeding to try the right to an office depending on such election.*" Of this the author says: "This rule is an eminently proper one, and *it furnishes a very satisfactory test as to what is essential and what is not in election laws.*" In note (1), page 618, Cooley says: "In *ex parte Heath*, 3 Hill, 42, it was held that where the statute required the inspectors to certify the result of the election *on the next day thereafter*, or sooner, the certificate made *the second day thereafter was sufficient*, the statute, *as to time, being directory merely.*" By this we understand the time for making up and returning the votes and complying with other directory provisions of the law, and not the time at which the election shall be held.

Let us apply these principles to the facts of the case at bar:

We have already referred in general terms to the evidence of acts of omission and commission on the part of the officers of election, and, more especially, the supervisor, which in the light of his declarations and conduct before and after the election, and his evidence on the trial of this case, can not but be viewed as done with fraudulent intent to carry or declare the result of the election adversely to plaintiff and the Democratic ticket generally. He admits a white majority of at least two hundred in the parish, and there is evidence that he stated after the election that Judge Beattie was the only Republican elected in the parish. He permitted or procured another person, a political partisan, to write up his tabulated return, and then indifferently signed it, giving the election against plaintiff and the Democratic ticket.

It is proven that there was no polling-place established in the eighth justice's ward; that there was no box or other means of holding an election at poll one, a white or Democratic poll, and that voters came and went away without voting or the opportunity to vote, although two commissioners and the United States supervisor state that they went there at five in the morning and remained till six in the evening; that the supervisor did not sign or send out the appointments of Democratic commissioners; that he promised repeatedly, and as often failed, to strike from the registry the names of dead men, persons removed from the parish, infamous by reason of conviction for crime, minors, and others not legal voters; and that a number of persons voted under these names and numbers for the Republican candidates; that others voted twice; that others voted under names and numbers not their own; that sufficient notice of the polling-places was not given to the Democrats, and was given to the Republicans; that the Democrats were refused their proper and legal representation in the appointment of commissioners of election, and that poll No. 17, at which the Republican candidates, including the defendant, got the entire vote, eighty-six in number, was removed surreptitiously, and without the knowledge of the Democrats, to a place other than that which the supervisor had appointed at their instance, and which was suitable and public, and the poll was actually opened and the election held at a place distant at least one mile from the proper one, against the protest of a few Democrats, who discovered the fact after the election had been proceeded with for a considerable length of time and many votes had been received. All these, and many other details which we can not enumerate, and the refusal to receive and count polls two and ten without sufficient legal reason, are, we think, sufficiently shown by the evidence in the record.

Returns from poll two were received but not counted, because not received within twenty-four hours after the election. There is not a particle of evidence in the record to show that the returns from this poll were other than an accurate report of the ballots cast, or that the election at that box was not perfectly peaceful and fair. On the contrary, it is shown affirmatively that it was so, and the district judge so states in his opinion. This poll gave the plaintiff 139 votes and the defendant 103, being a majority of thirty-six for plaintiff. Under the authorities cited, this box should have been, and must now be, counted, and so thought the district judge.

Poll No. 10 was held forty miles away from the court-house. The commissioners' count (and there were here, as elsewhere, none but Republicans) was completed, according to the testimony of one of them, Hutton, of O'Sullivan, United States supervisor, and of Joseph Legarde, about eleven or twelve o'clock at night. O'Sullivan testifies that he then

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"told Frustal that he must, as State commissioner, take the box to Thibodaux. He positively refused to do so, saying that he had no means of transportation. The same excuse was given by the other commissioners." Legarde swears that "after the votes were counted he and O'Sullivan started off; they 'hollowed' at us when we got at the door to stop, that we had to bring the box. Mr. O'Sullivan answered them he would not take it unless some of the commissioners would come with him. Mr. Frustal said he had passed the night before (he was one of the commissioners) *to find out where the poll was*, and that he would not pass another night. The other commissioner, Hutton, said the same thing, and they decided to send a constable with us who was there. I offered one of them my place in the buggy with Mr. O'Sullivan, and I would stay down there. They told me they would not come." Hutton, one of the Republican commissioners, testifies:

"The votes were counted and the box was sealed, and the box was delivered to the constable and Mr. O'Sullivan. I delivered the box to the Republican constable (whose name he gives as Levi White) and to Mr. O'Sullivan; the reason why we commissioners did not come up is because we had no conveyance to come up; and again I say that the election went on peaceably. My signature to poll ten is genuine. Mr. Frustal also signed it in my presence. Levi White and Lindsey Ingram also signed it in my presence."

In answer to a question by the court, this witness says: "The statement which I signed said Mr. Webre received 171 votes; that is about correct."

The same witness said: "Mr. Wilton received 44, 54, or 64 votes, I do not recollect. The vote for the other contestants was about the same, according to the best of my recollection; the Democratic majority at that box was about 125 majority." The written returns in evidence—the correctness of which is testified to by the other witnesses, and which were compared with the tally-sheets and ballots by experts, appointed in the court below—show the vote at this box ten to have been, for Webre 171, for Wilton 44, being a majority for plaintiff of 127 votes," thus showing how nearly it corresponds with the memory and statement of the Republican commissioner and witness for the defense, Hutton. The genuineness of the return and of the signatures of the three Republican commissioners to it is also shown by other witnesses; and there is no evidence that it was not correctly made. On the contrary, it is confirmed, as we have stated, by the report of experts; and it is further proved that the box was placed in the buggy of O'Sullivan at eleven or twelve o'clock at night; that they traveled all night to get to Thibodaux, only stopping a short time to get some refreshment on the way, and that the box was never out of custody of the Republican constable till

they arrived and offered to deliver it to Ledet, the Republican supervisor, about eight or half-past eight o'clock the next morning after the election. Ledet refused to receive the box, because, as he said at the time, it was not brought in by the commissioners, and it did not contain the returns. See testimony of O'Sullivan and Legarde, the latter of whom says the box was then placed in the hands of the clerk of the court. O'Sullivan says that he suspected that something was going to be attempted at this poll, from the fact that the supervisor had not supplied writing material, wax, etc., and that about 8:30 on the morning of the election a young colored man, who said he was one of the constables for that poll, arrived with an empty box at the polling-place. Legarde swears that this second box remained there all day; and O'Sullivan swears that these suspicions and the refusal of the commissioners to carry up the box made him determine that he would see it was properly returned. His vigilance alone, no doubt, defeated the purpose of the supervisor, Ledet, and of the Republican commissioners, that either another box should be substituted for the true one, or that no return should be made from this strong Democratic box. The fact that they found themselves unable to make this substitution, no doubt, determined them not to return the box at all, and when Ledet found, notwithstanding all their prearrangements to the contrary, that the true returns had been brought up under the eye of O'Sullivan, the United States supervisor, he determined not to receive them. This is the most reasonable conclusion from the evidence.

We omitted to state that a witness, Schmidt, and another, Comeaux, detail a conversation among some of the Republican officials and others in the clerk's office, in which apprehension was expressed that box ten would beat the Republicans except Beattie; and the subject of fixing the box to prevent that result was canvassed among them.

The district judge thought that this box ten should be counted, and so think we. That, as we have seen, gives the plaintiff 171 votes, and the defendant 44, a majority for plaintiff of 127 votes. By the return of the supervisor, without boxes two and ten, the defendant received a total of 1872 votes and the plaintiff of 1685; add the votes of the rejected polls, and the total vote of the defendant stands 2019, and of the plaintiff 1995, leaving a majority for the defendant upon a count of all the polls at which elections were held of twenty-four votes in the parish. In this computation we agree with the district judge also. He made a further deduction of six votes, which he thought it was proved that plaintiff had lost in ward eight, owing to no poll being opened there, and one minor and one convict, who had voted illegally, making eight. This, according to the district judge, reduced defendant's majority to sixteen. The plaintiff claims, we think correctly, to have proved that at least

thirty-six illegal and fraudulent votes were received for the Republican ticket, including the defendant, at different polls. We are satisfied there were a sufficient number to change the result. This fact is proved by several respectable witnesses, by the names and numbers under which persons voted fraudulently, and is supported by the general tenor of the testimony. The district judge thought it was not shown with sufficient clearness. The tabulated statements and direct testimony of witnesses, all of which are very minute and circumstantial, afford the best evidence possible in a case of so flagrant fraud, and we think it sufficient. These were composed of one minor and one convict, some who did not live in the parish, some who had not been sufficiently long in the State to acquire the right to vote, some who had voted twice, some who had voted under false or duplicate certificates, and some who had voted under the names and numbers of other persons, some of whom are proved to have been dead at the time. These facts taken in connection with the refusal of the supervisor to erase from the registry names which had no proper place there, and the well-known fact that at the last election there was unusual interest and effort on the part of the Democrats over the State, the fact shown in evidence that there was a registered white or Democratic majority in the parish of about two hundred votes, and the facts shown by the testimony, among which is that of Steinberg, himself a Republican, that "the parish of Lafourche has given Democratic majorities ever since the election of April, 1868," and that on the trial of this case the Republican supervisor Ledet himself admitted while on the stand that he had said to Judge Beattie that "if Darrell, the Republican candidate for Congress, did not give me (him) a place in the customhouse, I would come out and tell what advantages we Republicans had taken in the parish of Lafourche," and it will be impossible in the light of the other facts of similar character for any impartial mind to arrive at any other conclusion than that either the election in the parish of Lafourche in November last was really carried by the plaintiff and for the Democratic ticket, and a false return made, or that owing to fraud and other illegalities on the part of the Republicans, and especially of the officers conducting the election, there was no legal and valid election.

The district judge quotes the authority of *Auld vs. Walton*, 12 An. 141, for the position that the decision of the register of voters is a kind of judgment, and that the commissioners could not go behind his certificate. Even if that be correct, upon which we express no opinion, in the next paragraph of the opinion in the same case the court says further: "We do not hold, however, the judgments of that tribunal to be without appeal. The ninth section of the act—referring to the act to provide a registry for the parish of Orleans—provides a mode of redress by suit

against the register for an applicant to whom the register shall refuse a certificate. And *the validity of the certificate and the sufficiency of the proof upon which it is based may in all cases be examined* upon a contest of election by the tribunals seized of the jurisdiction of such contest."

We will now consider the facts connected with the election at poll seventeen, which gave to the defendant and to the Republican ticket, as returned, eighty-six votes, and none to the Democrats, and which plaintiff claims should be altogether rejected for several reasons, among which is that it was not held at the place fixed by law and the supervisor, but that without warrant of law and with intent to defraud the plaintiff, the election was held at a place away from the public road, and distant some two miles from that fixed by law and the supervisor. The district judge testified that "two days before the election the plaintiff, Webre, showed him that at several places the polls had been fixed at the quarters, back from the public road. I insisted that they should be placed upon the public road. Mr. Ledet demurred, saying it was too late to change, and that the change would give the Democrats the advantage. I told him that was a matter of opinion in which I differed with both the Democrats and Republican managers, *but that it did not look right, and that the change must and should be made.* I recollect that one of the polls was fixed for the quarters or sugar-house on the Dixie plantation, belonging to my wife. I insisted that this should be changed to the warehouse on the public road. *Mr. Ledet agreed to make these changes. On the Sunday preceding the election, in the afternoon, I understood that the changes had been made.*"

Other witnesses testify that they were made, at least as to poll seventeen, and a list of polling-places which appears in the ward, and which the record shows was published after the change, fixes the place for holding the election at poll seventeen *at the warehouse on the public road*, which is proved to be at a distance of not less than one mile from the place where the election was held. It is proved that shortly before the time for opening the polls, Mr. Billieu, United States supervisor, Mr. Gilmore, and Mr. Allen, the proprietor of the warehouse and plantation, went to the warehouse.

Allen testifies: "I was at home on the Rienzi plantation on the day of the last election, in November, 1876. I understood that the poll was to be held at my warehouse on the front of my plantation. I got up very early in the morning, I understood that the poll was to be opened at six o'clock, for the purpose of opening the warehouse or the pump-mill, which is just adjoining at a distance of about thirty yards from the warehouse. When I went there there was no person there. I waited an hour, I suppose, and finally Mr. Gilmore arrived, who, I understood, was

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one of the commissioners to hold the election. We two waited for a while, and Mr. Gilmore rode to the quarters to see if he could hear any thing of the election. He reported to me that they were holding the election in the quarters. I then went down and protested against the election being held there. After my protest they kept on holding the election there. I had no idea that the poll was to be held at the quarters; it was a perfect surprise to me."

Gilmore says: "I got up very early in the morning, before the time for opening the poll, *and went up to the place where notice of election said the poll of election was to be opened*, at the warehouse of Mr. R. H. Allen. I there met Mr. Billieu, United States commissioner, I believe. We remained some time, until after the hour when the poll ought to have been opened, and I then borrowed Mr. Billieu's horse and rode on to the other precinct, to see if any thing wrong had happened; Mr. Billieu was to remain to see if any one was going to come and open the poll. I then returned and found Mr. Billieu gone. In a short time I saw Mr. Allen, who was looking for the poll. After requesting Mr. Allen to remain there, I went toward the quarters to see if I could find Mr. Billieu. When I got there I found them holding the election in one of the houses in the quarters, and Mr. Billieu was there. I told the parties holding the election that notice was stuck up that the election was to be held at the warehouse on the public road. I objected to the poll being held there, and filed a written protest with the commissioner. He answered, '*that they were instructed to hold the election in the quarters, and that they were going to hold it there.*'"

This witness says he then left and went elsewhere and voted, but that he was put to inconvenience to do so, and that there were some Democrats who would not go to the same inconvenience to vote.

Richard Burton says: "I am manager of the Allen plantation. The poll was located at an unusual place, remote from the public road, where the general public, passing back and forth on the public road, could not see it. The establishment of the poll at that spot was done so clandestinely that the white Democrats residing on the plantation knew nothing of it until the day of election."

M. W. Billieu says: "Was Democratic supervisor at poll seventeen; repaired to the warehouse, where it should have been held, in front on the public road; waited till after six o'clock, the time for opening the poll. I learned by chance that it had been opened at the quarters on the Allen plantation, about one mile from the public road. I went down there and found the poll opened, and the voting going on *under the supervision of three Republican commissioners*, one white and two colored. I demanded of the white commissioner what he meant by such arbitrary and unjust proceedings, and was answered that he was acting under instructions.

I remonstrated with him, and that night entered a written protest against the reception of the box from that poll by the supervisor of election, Mr. Ledet."

This protest is in evidence. He further states: "Poll seventeen, as shown in the printed poster, is located at Allen's warehouse. It is like all the other posters I saw posted. It is a correct list as published and posted by M. A. Ledet, supervisor."

Lawson Banks, sworn, says: "I am a colored man, aged fifty years; I am a carpenter and wheelwright; have been working for forty years on Mr. R. H. Allen's plantation; was on that plantation on the day of election; the poll was opened in a room in the quarters once occupied by Buck Payne; I do not know at what hour of the night the poll was opened, but when I was called up I went to the poll that morning and believe the poll was opened before six o'clock; I could not at that time recognise a man the length of the room, it being so dark."

William Black, sworn, says: "Am a colored man forty years old; have been working on Mr. Allen's place since I could as a laborer; was on the plantation the day of election; I could not tell what time I got up; I got up before day; the poll was held in a house called Buck Payne in the quarters; when I found that the box was there I could only discern day-break; I did not know until that morning that the poll was to be held at the quarters; I thought it was going to be held at the front gate at the warehouse on the public road."

Without proceeding further with this already lengthy review of testimony, it is enough to say that the record can make no other impression upon any impartial mind than that this poll was not only held at a private place, not the polling-place fixed or published according to law, and too remote from it to be pretended to be a substantial compliance with the law, which is intended for the convenience of all voters, but also that this change was made surreptitiously and with a view to defraud in the interest of the defendant and his political friends, and against that of the plaintiff and his political friends.

Cooley's Const. Lim., p. 619, says: "Time and place, however, are of the substance of every election, and a failure to comply with the law in these particulars is not generally to be treated as a venial irregularity." In a note on the same page he cites Commonwealth vs. County Commissioners, 5 Rawle, 75, to the effect that an election adjourned without warrant to another place, as well as an election held without officers required by law, is void. We are also referred by plaintiff's counsel to an authority not in our reach at this place of session, McCrary on Elections, p. 86, No. 115, where, the counsel say it was held that "adjourning a poll from a school-house to a vacant lot half a mile off is void," and other cases are said to be there cited in support of this position. We

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regret that we have not now access to them and other authorities bearing upon this important question. The reason of the rule invoked is, however, very manifest, and the circumstances attending the removal of poll seventeen from the place fixed by law to another and unauthorized place make it the more manifest. The object of the change is proved to have been to take unlawful advantage of political adversaries; in other words, to defraud the law and *prevent a fair, full, and independent* expression of the popular will. Courts can not lend their aid to such a purpose. It was no more legal to hold an election where it was held, and to return it as that from poll seventeen, than it was to hold it at *any other time than that fixed by law*. It is well settled that can not be done. There was no election held at poll seventeen in the parish of Lafourche on the seventh of November last. We have been unable to find, and have been referred to no case, where votes cast under such circumstances have been counted to determine an election. Our conclusion, therefore, is, that what purports to be the return of this poll should not be counted or considered in determining the result of the election. This, of itself, is sufficient to give to the plaintiff, Webre, a clear majority of the votes, and, when considered in connection with the evidence of illegal and fraudulent votes received by his opponent, and which must be considered as not cast, and with the cutting off of votes from the plaintiff to which he was entitled, and which he would have received had the election been legally and fairly conducted, makes it impossible that the defendant should retain the office in any event; and, in view of all the facts of the case, we are of opinion that, upon a fair and legal count of all the legal votes given, the plaintiff received a majority.

It is also shown by Republican testimony that there was much intimidation of the colored voters by Republicans, and none of any class by Democrats. The supervisor, Ledet, himself swore on the trial below that he did not establish any voting precinct in the eighth justice's ward, as required by law; that the people there had always been Democrats, to his knowledge; that if deprived of their full vote, the party and the contestants had lost thirty or forty votes; that "many of them were poor people, who had no means or facilities to travel to other polls to vote." He says, further: "There is a majority of whites of about two hundred in the parish, and I think if we had not taken the advantages that we have the parish might have gone Democratic."

We think, on the whole case, that the evidence does establish that the illegal acts and matters complained of by the plaintiff did materially affect the result of the election, and that that result was not truly declared by those whose duty it was to do so.

The district judge thought the petition was not specific enough in its allegations. The evidence has supplied any defect of allegation.

We have been consoled in the protracted examination and review of this record of official corruption and deliberate fraud upon the most sacred rights of the people by the reflection that this case may serve as a warning for the future for the same people to guard more sacredly than ever the palladium of their liberties, and with that view, to provide, if need be, by law, and also by the elevation of public morals, against the possibility of the repetition of such acts. It may also serve to teach the immediate wrong-doers and all who have sought to profit by their acts, that there is still left a means of redress and a portal on which is written, "*Procul, O procul este, profani!*"

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be annulled, avoided, and reversed, and that the plaintiff, L. A. Webre, be and he is hereby declared to have been duly elected sheriff of the parish of Lafourche at the general election on the seventh of November last, 1876, and that he is entitled to the fees and emoluments of said office. It is further ordered and decreed that said plaintiff, Webre, be inducted into his said office, and that the defendant and appellee pay the costs of both courts.

We append, as part of this opinion and decree a computation of the vote according to the views announced therein:

	Votes.
According to the supervisor's return defendant, Wilton, received	1872
Deduct for poll seventeen.....	86
For other illegal votes.....	36— 122
Leaves.....	1750
Add vote at poll two.....	103
Add vote at poll ten.....	44
Makes a total of.....	1897
According to the supervisor's return plaintiff, Webre, received	1685
Add vote at poll two.....	139
Add vote at poll ten.....	171
Makes total for Webre of.....	1995
Deduct Wilton's vote.....	1897
Leaves Webre a majority of.....	98
without reference to six votes computed for him from ward eight by the district judge or any greater number proved.	

ON APPLICATION FOR REHEARING.

MANNING, C. J. It is rightly remarked by the counsel for the defendant, in his brief supporting the application for a rehearing: "The great

underlying principle in all contested election cases is to ascertain the will of the majority." The problem is to secure first to the voter a free and untrammelled vote; and, secondly, a correct record and return of the vote, and that in all cases, it is incumbent on the contestant to shew that the acts of which he complains changed the result.

And we will add, if the acts of which a contestant complains do not change the result, courts will not intervene, though the conduct of the one or the other may be tainted by fraud, or vitiated by violence. For of what concern is it to judicial tribunals to learn what bad and illegal acts either candidate may have been guilty of, if one received so large a majority over the other that he is elected, notwithstanding the deduction from his poll of all the votes that should not have been received nor counted.

But when the case is otherwise—when the object and purpose of the officials who have the machinery of elections in charge is shown by testimony to have been, not the ascertainment of the will of the majority, but the perversion of the expression of that will; not a correct record and return of the vote, but such a return as accomplishes a predetermined result; not an untrammelled vote, but so to trammel it by cunning devices that the suffragan has been deceived or misled—then it is the highest office and the most imperative duty of a court to vindicate the purity and inviolability of the ballot, and to take care that the republic, whose corner-stone is the vote of the citizen, shall receive no harm.

For the fundamental principle of every representative government is that it is not the return, but the *election*, that entitles a party to an office. Hence it has been uniformly held that the official return of an election is only *prima facie* evidence of its legality and correctness, and that a court can go behind it to ascertain the true state of the vote. If this were not so, why should the intricate forms for registration be prescribed, or why the necessity of the voter personally offering his vote, or offering it at all, if a power rested anywhere to disregard every thing that had been done at the ballot-box, and elect at the returning-board. The act of casting a vote is not to the citizen an empty form. It is the lever by which the majority raises itself to the summit of the government, and there controls, orders, executes.

Ledet, as supervisor of registration for Lafourche parish, made return of the election, and impeached the truth of his return by his testimony on the trial. We are reminded, in the brief for the rehearing, of Lord Mansfield's declaration, that "it is of consequence to mankind that no man shall hang out false colors to deceive them by first affixing his signature to a paper, and afterward giving his testimony to invalidate it."

But that great jurist would not have felt himself precluded, by the enunciation of this wise maxim, from receiving the testimony of a

criminal who had become the State's witness against his fellows. And in a civil action where the public interests are involved, as in a contested election suit, more than the interests of the individuals who are parties thereto, it is no infringement of that principle to hear from him who hung out the false colors the story of the manner in which they were fashioned, and his intent in displaying them.

Nor is it Ledet alone who details the circumstances preceding and attending this election. Other witnesses, who are reputable citizens, inform us that when notice was given of the election that was to be held, no indication was made of the places where it would be held, nor was this necessary information supplied publicly until twenty-four hours before the time for opening the polls. This delay or omission might have been attributed perhaps to negligence or forgetfulness, but for the fact, of which the evidence leaves no room for doubt, that information of the location of the polling-places was early given to one of the political parties, and was withheld from the other. The record shows that on the sixth of November the supervisor, Ledet, published for the first time what he termed "a correct revised list of polling-places to be opened on the seventh throughout the parish for the convenience of the electors of Lafourche."

The acts complained of by the plaintiff, and which changed the result, are reviewed *in extenso* in the opinion read by my brother Egan, and we are constrained to say there is too apparent to be unobserved or disregarded a design to thwart rather than promote a fair expression of the popular will by the officers who supervised this election. And this design, the first indication of which is afforded by the omission to give publicity to essential preliminaries, is developed more audaciously as the election-day approaches, and culminates in excluding from the return two boxes which the judge of the lower court demonstrates should have been counted.

The return of the supervisor, or registrar, which excluded polls two and ten, was thus:

SUPERVISOR'S RETURN.

Wilton's vote.....	1872
Webre's vote.....	1685
Wilton's majority.....	187

The district judge properly regarded this return as evidence only that *prima facie* it was correct, but admitted testimony and testified himself of matters, the object and effect of which was to impugn its correctness. He revised this official return, counted the votes of the two rejected polls, and also counted six votes for Webre which were not cast for him, but which the judge believed from the evidence would have

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been cast for him, if the voters had not been prevented from voting. He also deducted two votes from Wilton which he thought were improperly received.

DISTRICT JUDGE'S COUNT.

Wilton's vote by supervisor's return.....	1872
Wilton's vote at poll two.....	103
Wilton's vote at poll ten.....	44
	<hr/>
	2019
Deduct votes.....	2
	<hr/>
	2017

Webre's vote by supervisor's return.....	1685
Webre's vote at poll two.....	139
Webre's vote at poll ten.....	171
Add votes he would have received.....	6—2001

Wilton's majority.....	16
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We do not count for Webre any vote that was not actually cast for him, nor do we reject any vote for Wilton that was cast for him, except poll seventeen, and thirty-six votes which are part of a larger number that Webre alleged were improperly received. The lists, made part of his petition, comprised one hundred and nine names, of whom eleven voted on dead men's papers, eight were convicts, four were persons who had removed from the parish, twenty-three voted twice on that day, and sixty-three voted on fraudulent certificates. The proof satisfied the lower court that two of this number should be rejected. It satisfies us that thirty-six of them should certainly be rejected.

THE CORRECT COUNT.

Webre's vote per supervisor's return.....	1685
Webre's vote at poll two.....	139
Webre's vote at poll ten.....	171
	<hr/>
	1995

Wilton's vote per supervisor's return.....	1872
Wilton's vote at poll two.....	103
Wilton's vote at poll ten.....	44

 2019

Deduct poll seventeen.....	86
Deduct fraudulent votes.....	36— 122—1897

Webre's majority.....	98
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The counsel for the defendant urges strenuously for a rehearing upon

Webre vs. Wilton.

the erroneous rejection of poll seventeen. If we should concede to the defendant all the votes at that poll, and follow the example of the court *a qua* in counting those votes for Webre that he would have received at ward eight if an election had been held there, it would not change the result. The court below counted for Webre six votes, as if they had been given him at that poll, though in fact no poll was opened there. But if we are to take that poll into account at all, the evidence establishes a larger number. One set of witnesses say that Webre would have received forty or fifty votes at that poll if it had been opened. The other set say he would have received thirty or forty votes if it had been opened. Give him the smallest number, and count poll seventeen for his adversary:

Webre's vote <i>ut supra</i>	1995
Add votes for box eight.....	30
	2025
Wilton's vote <i>ut supra</i>	1897
Add poll seventeen.....	86
	1983
Webre's majority.....	42

A careful review of our first opinion, and a re-examination of the record, leave upon our minds no doubt of the correctness of our former decree.

Rehearing refused.

No. 763.

W. E. WAMSLEY VS. J. A. HUNTER ET AL.

Judgment can not be had on a debt not yet due and exigible.

A vendor who has guaranteed a good title to the property he has sold, can not collect the price of the sale from the vendee until he has made the title good.

A PPEAL from the Seventeenth Judicial District Court, parish of Red River. *Pierson, J.*

L. B. Watkins, for plaintiff and appellant.

Land & Taylor and William H. Wise, for defendants.

The opinion of the court was delivered by

MANNING, C. J. This suit is upon three notes, which represent a part of the purchase-price of the "Wray and Boland Plantation," and for the enforcement of the vendor's privilege thereon. The plaintiff was the vendor. Hunter and Virgil A. Stewart were the vendees. The other defendant, William B. Stewart, is a surety.

The defendants excepted: First—That the petition discloses no cause of action. Second—That the notes sued on are not yet due.

First—The petition alleges the indebtedness by reason of the execution of the notes, sets forth their date, amount, and maturity, avers the existence of the vendor's privilege, states specifically the particular land that was sold, and concludes with a proper prayer. We are unable to perceive in what particular the petition was deficient of any allegation necessary to shew a cause of action.

Second—The last maturing note was not due until the tenth of November, 1873. The others matured in 1871 and 1872 respectively. The suit was filed in August, 1873, and service was made on the sixth of that month. The plaintiff could have omitted the last note from the suit, and prayed that the judgment should be for the two matured notes, and that the terms of sale should be for cash to the amount of those notes, and on a credit to correspond with the maturity of the third note, as they were all secured by the same mortgage. The trial did not take place until 1876, long after the third note had matured, but that did not justify a judgment upon it, as the plaintiff failed to amend his petition after the maturity of the note.

The defendants answer that the plaintiff obligated himself in the sum of seventy-five hundred dollars to execute a good title to them of the land, for the price of which these notes were given, and that he never complied with that obligation, and can not do it, because his vendors were not paid their price, and these vendors can foreclose their mortgage upon the land. In two supplemental answers they recite the commencement and prosecution of proceedings by the hypothecary creditors of plaintiff against the land, and allege the danger and almost certainty of eviction, and pray that if judgment be rendered against them for the amount of the notes, execution be stayed until the plaintiff shall comply with his obligation to give them a good title, or shall give security against the injury consequent upon their eviction from the land. They also allege that the sale made by the plaintiff to them is liable to dissolution, and pray that the sale be rescinded, and they be restored to the condition they were in when it was made.

There was never any sale by plaintiff to defendants of the Wray and Boland tract of land except that which resulted from the promise or engagement to sell contained in the bond, and his inability to perfect the title is now beyond dispute. The land was eventually sold under the mortgage given by plaintiff to his vendor, and the defendants were evicted. The plaintiff is dead, and his estate is insolvent. There was judgment in favor of the administrator of the plaintiff for the amount of the three notes and interest, but execution was perpetually stayed unless the plaintiff's representative shall execute a good title to the defendants.

We think the defendants are entitled to judgment in their favor upon the moneyed demand, and to a reservation of their right to pursue the plaintiff's succession for such damages as they have suffered by non-fulfillment of the obligation of his bond. Therefore

It is ordered, adjudged, and decreed that the judgment of the lower court is avoided and reversed, and that the defendants have judgment against the plaintiff's administrator upon the notes, disallowing and rejecting the same, and that their right to a future action for damages for non-fulfillment of the decedent's bond is reserved; the plaintiff and appellee to pay costs of both courts.

No. 761.

JOHN H. SHEEN ET AL. VS. ROBERT STOTHART ET AL.

29 630
52 2101
52 2102
29 630
113 858
114 684

29 630
121 571

The municipal authority of a town has a right to remove, or cause to be removed, any obstruction of the public streets.

Mere non-usage by the public of the soil forming part of a public street, will not prescribe against the right of the municipal corporation, and the public, to resume its use, and clear it of obstructions.

The dedication of property to public use may be established by any evidence which shows the intent of its owner to so dedicate it.

Whoever buys real estate within corporate limits, with reference to a certain plan which sets forth the public streets of a town, is estopped from denying the servitude imposed by those streets.

Damages can only be allowed by the decree dissolving an injunction, when the judgment which has been enjoined is for money.

A PPEAL from the Seventeenth Judicial District Court, parish of Red River. *Pierson, J.*

J. F. Pierson, for plaintiffs and appellees.

L. B. Watkins, for defendants.

The opinion of the court was delivered by

EGAN, J. The plaintiffs, claiming to be owners of certain lands in the town of Coushatta, sue the defendants for damages for throwing down their fences, and also enjoin them against further and apprehended repetition of the acts complained of. All of the parties were at the time residents of the town; one of them town marshal, and the other two defendants property-holders as well as residents. The defense is, that plaintiffs were unlawfully obstructing streets and the use of streets necessary and useful to the public and to the defendants and their property, and that the removal had been ordered by the town authorities and was done in accordance with an ordinance so directing, which likewise made it highly penal for any one to obstruct or stop any of the streets of the

town; that it was competent for the town authorities to direct and their marshal to carry out the removal of obstructions in the streets, and for that purpose to employ or obtain assistance, is too well settled and too necessary an exercise of the ordinary police powers of municipal government to be now questioned. 3 An. 563; 11 M. 620; 2 N. S. 317; 3 N. S. 140; same 293. To do so, therefore, is not to commit trespass or to authorize money demand of damages, unless the power is exercised in such violent manner and with such other acts, not here alleged, as would of themselves give rise to an action. Even the proprietor of the soil subject to the public use could not complain of its being kept for that purpose, and such complaint would be *damnum absque injuriâ*. 13 L. 111; 3 L. 563.

Every inhabitant of a town, and even the general public, is interested in keeping open and unobstructed to public use its streets and highways. Property owners are especially interested in so doing, and in procuring the enforcement of, any ordinances provided for that purpose. In *Daublin vs. Mayor of New Orleans*, 1 M. 187, Judge Martin said: Streets are "*hors du commerce*;" they are the property of no one, not even of the corporation. "The use of them belongs to the whole world, and that by removing obstructions from them no possession was taken." He also maintained the right of the city authorities to pass ordinances for that purpose. In that case the plaintiff was renting a house which partially obstructed a street and the authorities sued him and had it pulled down and removed. This right has been too often exercised since to be now questioned. 4 An. 73; 20 An. 226; 3 An. 230; 22 An. 526. It is also well settled that once a dedication to public use has taken place, no silence or length of time or of non-user can deprive a public corporation of its power over public places. See same authorities, and 2 Dillon 531. •

Possession can not be pleaded against a public right, unless it has been immemorial. 3 N. S. 293. No person, not even the owner of the adjacent soil, and who may have a reversionary interest, has a right to obstruct a highway or public road or street. Such obstruction is a public nuisance, and may lawfully be removed or destroyed by the municipal authorities. 3 La. 563; 11 An. 620; 2 N. S. 317; 3 N. S. 140; same, 293.

Let us apply these well recognized principles to the facts of this case.

The town of Coushatta is regularly incorporated, with a mayor and council. It was laid off and properly sold and acquired according to a map made by one Armistead, parish surveyor, under authority of the police jury of the parish, in anticipation of the incorporation of the town. This map is deposited in the recorder's office, and is, and has been, ever since, recognized by the authorities and inhabitants as the

official map of the town, which is the parish seat of Red River parish. The plaintiffs have both bought and sold property according to this map, upon which appear the regular designation of lots and streets by name, as well as direction and dimensions, and the town has been built accordingly.

The property of plaintiffs was acquired from one Hammett, on the eighteenth of January, 1876, and is described as being in and near the town of Coushatta, and as comprising that portion of a certain designated tract east of Red river, "except the lots sold by W. W. Armistead, former tutor of the minor heirs of said Cowden, deceased, as of record and on file in the recorder's office of said parish and State, and being the same land purchased by said Hammett from T. R. Armistead, tutor, by notarial act passed before D. H. Hayes, notary public, on the seventh day of January, 1876, which latter title contains the same exceptions and references to former sales of lots by W. W. Armistead, former tutor. Several of these sales appear in the record, and refer directly to the Armistead map, and to the streets upon which they front by name. Among them are titles to lots purchased by two of these defendants, Gohagen and Brown, both of whose properties are in close proximity to that purchased subsequently by the plaintiffs, and the value of which, as well as the convenience of use, we think it is manifest from the evidence, will be materially impaired by the fact that, a few days after their purchase, the plaintiffs inclosed the whole of the land purchased by them with what their counsel calls boundary fences, and thereby obstructed the streets, the attempt to open which by the town marshal, assisted by the other defendants, is enjoined in this suit, and made the basis of the claim for damages.

There is no question that these streets appear in the Armistead map as extending through plaintiffs' property, and that they had been built upon in other portions and made use of over plaintiffs' property before they acquired it, and that they immediately proceeded to close these avenues by extending the fence which already inclosed a portion of the property acquired by them. It is, however, claimed by them that a few years before, and shortly after the town was established, the whole of this land was fenced in and cultivated. This, as we have seen, had it continued even longer, could not have interfered with the right of the town authorities to open the street at any time, and it appears they were subsequently opened, voluntarily or otherwise. The destination made by the owner is equivalent to title in regard to such servitudes as the streets and other public places of towns and cities. C. C. 767; 18 An. 560; 21 An. 244. No deed or act of conveyance is necessary. Same authorities. Long silence of owners and use by the public is evidence of dedication. The sale of lots, with reference to a plan or description upon which there

Sheen vs. Stothart.

appear certain streets and avenues amounts to an immediate and irrevocable dedication of such streets and avenues to the public, and the vendees and the public generally have a right to their use to their full extent. 2 Dillon, 503; 8 R. 92; 9 An. 244; 15 An. 9. These principles were discussed and fully recognized by us in a late case decided at New Orleans of *Burke vs. Wall*, ante, p. 38. If, at the time of the purchase of property in a city or town, there existed in its favor an apparent right of servitude between that and other property, it continues to exist actively or passively upon or in favor of the property sold. 12 An. 108.

It is, however, argued on the part of the plaintiffs that the defendants acquired their title from a tutor, who had no power or right to create servitudes. The evidence satisfies us that the dedication took place before either plaintiffs or defendants acquired, and if it did not, both plaintiffs and defendants acquired from the same source, and the latter first, while the plaintiffs' acquisition was made, as we have seen, subject and with direct reference to the former sales to the defendants and other persons. It does not, therefore, lie in the mouths of plaintiffs to complain of the want of power or title in their common author to do what was done. Title in defendants was, however, not necessary.

Plaintiffs' counsel objected and excepted to the reception of evidence of title in this, which they claim to be a possessory action. No one is claiming either title or possession from them, nor seeking to acquire any possession, but only to remove obstructions placed by them in public streets of the town, in violation of the ordinances of the town and the rights and interests of others and of the public. The rules applicable to a possessory action do not, therefore, apply. The evidence was pertinent, and bore directly upon the issues, and was properly admitted, and so, in our opinion, should have been all evidence going to show dedication or use, and the existence and character of a map of the town, and the fact that sales had been made and buildings erected and streets laid off and used according to it.

It would, indeed, have been quite immaterial if the particular streets, the right to close or prevent the use of which is claimed on one side and denied on the other, had never before been used. If they appeared upon the plan of the town, and extending over the property in question, they might have been opened to their full limit at any time, and neither the former proprietor nor plaintiffs could have objected, and especially not the latter, who were themselves aware of the existence of the plan or map of Armistead, as one of them testified, and as is shown sufficiently by their residence in and acquisition and sale of property in the town.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; that the demand of plaintiffs be rejected with costs of both courts, and that the defendants

recover against them and their surety on the injunction bond, G. W. Carlton, *in solido*, two hundred dollars damages as attorney's fees.

Plaintiffs and defendants have applied for a rehearing of this cause. Their application is granted.

ON REHEARING.

The opinion of the court was delivered by

DEBLANC, J. We have considered with care the elaborate and plausible printed argument submitted by plaintiffs' counsel in support of his application, and we have again examined, with the attention which should be expected from every court, and more particularly from one of last resort, the pleadings, the evidence, the original briefs, and the authorities in this case, and we remain convinced that, except on one point, our first decision conforms to the pleadings, the evidence, the law, and our jurisprudence.

One of the reasons urged by plaintiffs' counsel to obtain a rehearing is that "damages can be allowed, in the decree dissolving an injunction, in only those cases in which the execution of a money judgment has been suspended by the writ." In this, according to our jurisprudence, he is right.

Were we called upon to establish a precedent, we would look in vain in the Code of Practice for a single provision postponing, as between the parties to the suit, a demand so germane, so connected with, and so eminently incidental to the main action.

As to the sureties on such bonds, the recourse against them should, we admit, be by a direct action on their obligations; for, so far as they are concerned, the action on the bond is independent from that brought by plaintiffs, but, as to the principals, the demand for damages against them, whenever and howsoever made, has but one character, one name; it is a reconventional demand, and it might, it seems, be urged and passed upon in the suit from which it springs. C. P. 375.

However, an adverse construction has been sanctioned by a long list of decisions—perhaps disputable—but no longer disputed, and we are not inclined to now change a precedent which, for so many years, has stood in our reports as a guide to the bar, the bench, and litigants.

It is therefore ordered and adjudged that defendants' claim for damages be and the same is hereby disallowed, as in case of nonsuit, and their action on the injunction bond specially reserved. It is further ordered that, as above amended, and in all other respects, our former decree remain undisturbed.

No. 748.

J. H. STEVENS vs. J. L. HELPMAN.

29	635
48	1339
49	1345

An unfair preference given by an insolvent to one creditor, and his misrepresentations to his creditors, intentionally made to lull them into a deceptive sense of security, will justify them in attaching his property.

A PPEAL from the Tenth Judicial District Court, parish of Caddo.
Boarman, J.

N. C. Blanchard, for plaintiff and appellant.

J. L. Hargrove, for defendant.

The opinion of the court was delivered by

EGAN, J. Plaintiff sued the defendant, a small shop-keeper in the city of Shreveport, upon accounts for merchandise sold. He at the same time sued out an attachment and had seized a small stock of goods. The grounds set up for attachment are those embraced in the fourth and fifth clauses of article 240 of the Code of Practice. There was judgment for plaintiff for the amount of his demand and dissolving the attachment. From this he has appealed.

The facts are that plaintiff and Roos and Dillon, all merchants of Shreveport, had supplied the defendant with goods for his small establishment; that he had been at first tolerably prompt in paying for them, but, falling behind, was pressed for payment. On the fifteenth of January, 1877, being indebted to plaintiff and several other persons and being, it appears, insolvent, he presented to the district judge a petition and schedule, praying to be allowed to make a *cessio bonorum* under the insolvent laws of the State. Without obtaining or waiting for any order of the judge, he at the same time transferred what he said was all his property subject to seizure, consisting of the small stock of goods in his store, to one Heffner, ostensibly and in terms to be administered and disposed of for the common benefit and account of his creditors. Roos and Dillon immediately transferred their accounts to the plaintiff, Stevens, as he says, to save costs, and with an agreement to pay so much of amounts received, and he, on the eighteenth of January, sued out this attachment upon his own account and those thus transferred.

The store of defendant was closed, and he had apparently stopped business at the time. He had previously represented to the plaintiff and Dillon that the reason of his being slow to pay was that he had been spending money to improve a farm which he professed to have. On the trial he swore that this farm consisted of forty acres of land entered under the United States homestead law, and to be paid for in five years, only one of which had expired; that the only improvement was the clearing of *one acre* of ground by a man whom defendant had hired for that purpose, and that he had expended not more than twenty-five

dollars on the place, *had never lived upon it*, and the title was then in litigation between him and one Herold. This, then, was clearly a misrepresentation, designed and calculated to deceive and lull his creditors into a false sense of security. His title was at best but inchoate, the amount expended inconsiderable, and the circumstances detailed indicate a purpose on his part to defraud the Government, as one of the conditions of such entries is occupation of the land. Under the circumstances this land was no basis of credit, though attempted to be used as such.

Defendant's wife owned, before these debts were contracted, a lot, upon which she made improvements with money earned by her as dress-maker since the debts were incurred. She is not separate in property, but advertises and conducts business in her own name and buys and sells in her business the same way, of which plaintiff complains, we think, without cause.

The defendant put part of his stock in a small establishment kept by his brother-in-law, Koach, in Mugginsville, a suburb of Shreveport, and some time in December, before this attachment, sold the goods to his wife's sister, Mrs. Koach, as he says, in payment of a debt of one hundred or one hundred and fifty dollars, which he owed her for borrowed money, upon which he claimed still to owe a small balance of fourteen dollars. These goods, so used, were in all probability some of those purchased from plaintiff, Roos, and Dillon.

While defendant may have been to some extent misled by the attorney who found the statute in the books and supposed a *cessio bonorum* under the insolvent laws of the State might be made without reference to the existence and operation of the United States bankrupt act, it is nevertheless evident from the circumstances detailed that the object of the defendant was, so far as possible, the obstruction and avoidance of the pursuit of his creditors and of the payment of his just debts.

While attended with this novel feature of the so-called assignment, never accepted nor consented to by his creditors, who appear not to have been consulted in the matter, we can not look upon this otherwise than as another of those too frequent cases of an attempt on the part of small tradesmen to defraud their creditors. That an unfair preference was given by defendant to one of his creditors, his sister-in-law, under suspicious circumstances, is clearly shown. We think the attachment was warranted and should have been maintained.

We can not give our sanction to the dishonesty attempted to be practiced by the defendant and which has become latterly far too common. So far as it is in the power of the courts to do so it should be stopped.

After the attachment several other non-resident creditors intervened

Stevens vs. Helpman.

by way of opposition, claiming their right to be paid ratably out of the proceeds of the property attached, upon the ground of the insolvency of the debtor and that this was all his property. Their oppositions were dismissed in the court below, and they have not appealed. It is therefore unnecessary to consider their claims.

It is therefore ordered, adjudged, and decreed that the judgment of the court below dissolving plaintiff's attachment be annulled, avoided, and reversed; that the attachment be and it is hereby reinstated; that the plaintiff's privilege as attaching creditor be recognized and enforced by the sale of the property attached; that the judgment of the court below be in all other respects affirmed; and that plaintiff recover against the defendant the costs of appeal as well as of the court below, including those of attachment.

No. 711.

STATE EX REL. T. P. FARRAR VS. HENRY A. GARRETT.

The title of a law, repealing certain sections of the Revised Statutes of 1870, adequately expresses the object of the law, when it designates the *numbers* of the sections repealed.

The power to fill the office of district attorney *pro tempore* vests in the Governor, by virtue of the general law authorizing him to fill vacancies in office.

50	637
50	23

A PPEAL from the Thirteenth Judicial District Court, parish of Tensas. *Hough, J.*

J. Tyson Lane, for relator and appellee.

Seale & Morrison, for defendant.

The opinion of the court was delivered by

MANNING, C. J. This is a contest for office under the intrusion act.

The relator was appointed district attorney *pro tempore* for Tensas parish by Governor Nicholls, and the appointment was confirmed by the Senate on the thirtieth of January, 1877. He was commissioned on the following day, and qualified on fifth or sixth of February.

The respondent was elected to that office by the police jury of Tensas parish on December 21, 1876, and qualified under that election on the same day. On third of January, 1877, he was appointed to the same office by W. P. Kellogg, then acting as Governor. His appointment was not confirmed by the Senate. He qualified under this appointment on sixth of February, 1877.

The respondent's title under this appointment is manifestly bad. We take judicial cognizance of the sittings of the General Assembly, and

therefore we know that the Senate was in session on the third of January, 1877. There is neither proof nor pretense, that the appointment of respondent was submitted to the Senate, or if submitted, that it was confirmed. The Senate not being in recess at the time of respondent's appointment, it was of no effect until it was confirmed by that body. Moreover the relator shews by the Senate's journals that he was confirmed on thirtieth of January, 1877.

Another question, however, lies behind this, which relates to the mode of filling this office, and since the respondent sets up an election by the police jury as his title, against the relator's appointment by the Governor, it is necessary to examine which is the proper authority to confer the office.

In 1868 the office in question was created, and the provisions of the law of that year are incorporated in the Revised Statutes of 1870 in sections 1178—1189, inclusive. In 1874 there was passed an act to repeal sections 1178, 1179, 2760, and 2761 of these statutes, and for other purposes. Acts 1874, p. 81. These four sections confer the power of appointment of district attorneys *pro tempore* upon the police juries.

The constitutionality of that act is attacked, because its object is not expressed in its title, inasmuch as other of its sections provide for the appointment of these officers by the Governor. One of its objects is to repeal certain sections of the Revised Statutes of 1870, as articles of the Civil Code and the Code of Practice have been repeatedly repealed or modified by reference to their numbers alone, and that object is sufficiently expressed in the title of this repealing act. The remaining part of the description, "and for other purposes," is too vague, and affords no indication of the object of the law, and therefore those clauses of the law of 1874 which confer upon the Governor the appointment of these officers is void.

The office of district attorney *pro tempore* remains, as created by sections 1180—1189, inclusive, of our Revised Statutes of 1870, but the mode of filling that office prescribed in sections 1178 and 1179, no longer exists, since these two sections are repealed. The transfer to the Governor of the authority to appoint, made in section two of the act of 1874, is without effect, since that part of that law is void. But the Governor derives authority to appoint from a general law which declares that whenever a vacancy in any office occurs, either from death, resignation, or from any cause whatever, it shall be filled by the Governor by and with the advice and consent of the Senate. Rev. Stat., 1870, section 1577.

There was a vacancy in the office of district attorney *pro tempore* of Tensas parish at the time Governor Nicholls appointed the relator. The terms of these officers are coterminous with district attorneys, and

State ex rel. Farrar vs. Garrett.

expired after the election of November, 1876. In January, 1877, this vacancy was filled in Tensas parish by the appointment of the relator, who is therefore the rightful occupant of the office. The lower court so held, and

It is ordered, adjudged, and decreed that the judgment of the lower court is affirmed with costs.

No. 717.

BETTY A. THORNHILL ET AL. VS. EDMUND BURTHE.

The validity of a mortgage will not be affected by an error in the number of the "range" in which the property covered by the mortgage is situated, if the property is otherwise described in the mortgage with such certainty as to clearly identify it.

A PPEAL from the Eleventh Judicial District Court, parish of Claiborne. *Trimble, J.*

George & Taylor, for plaintiffs and appellants.

J. C. Egan and J. S. Young, for defendant.

The opinion of the court was delivered by

MANNING, C. J. Thomas H. Brown sold a tract of land in Claiborne parish to J. A. Chaleson on the twenty-ninth of January, 1866, and retained a special mortgage upon it to secure the price. There is nothing in this badly-prepared transcript to shew that this deed was ever recorded. Appended to it is the statement by B. D. Harrison, deputy recorder, that one of the witnesses to the deed had appeared before him, and made oath to its execution, which statement is dated January thirtieth, 1866, but there is no certificate that it had been recorded. All the parties to this suit, however, and their counsel, treat it as recorded, and we shall follow their example.

On the twentieth of December, of same year, Chaleson executed other notes in lieu of those recited in the act of sale, and gave a special mortgage upon the same land to secure them, which was recorded on the eighteenth day of February, 1867.

Brown sold these notes to one Bryant on March 6, 1867, who sold them to P. J. Pavy & Co., on March 24, 1871, who in their turn sold them to the defendant on the twenty-sixth of May of same year, and he instituted suit upon them, and on the third of May, 1873, judgment was rendered in his favor against Chaleson for their amount, subject to specified credits, and the mortgage, of date December 20, 1866, and recorded February 18, 1867, was recognized.

29	639
44	823
29	639
114	823
29	639
115	178

Betty A. Thornhill vs. Burthe.

Previous to this, viz.: on November 1, 1871, the plaintiffs had obtained a judgment against Chaleson, which they recorded April 26, 1873.

Execution issued upon defendant's judgment for his moneyed demand and for the enforcement of the mortgage which that judgment had recognized, and the land was sold by the sheriff and bought by the defendant on sixteenth of November, 1874.

The plaintiffs institute this hypothecary action to compel the defendant to pay their judgment, or surrender the land to its satisfaction, and they base their demand upon the fact that there was a mis-description of the land in defendant's mortgage, the number of the "range" being different from the proper one, and further, upon the alleged payment of the notes upon which defendant had sued, before the institution of the suit.

Neither ground is tenable. The land is described by numbers of sections, township, and range, and correctly of each except the last, and also by the number of acres, and the further recital is made that the notes secured by the mortgage represent the original purchase-price of the land bought by Chaleson from Brown, and the act of sale yet further designates the land by reference to the title of Brown from his vendor, the date of which is given. There could be no mistake as to the tract of land, its location, or boundaries, and there is no pretense that the plaintiffs were misled. The description in the acts sufficiently identifies it, and perfect certitude is attained when the sheriff and recorder testify that Chaleson had no other land in that parish than the tract sold to him by Brown, mortgaged by him to Brown, and bought by Burthe, the defendant, upon the foreclosure of that mortgage. If the description of a tract of land in an act of mortgage informs the public what property is covered by it, without stating the township or other divisions, it will be sufficient (*Consol. Asso. Planters vs. Mason*, 24 Annual, 518), as, for example, where it is described as being on a particular river in a named parish, adjoining named proprietors (*Ells vs. Sims*, 2 Annual, 251), or the bayou upon which it is situated is named with the parish, the number of acres it contains, and reference is made to the conveyance by which the mortgageor acquired it. *Baker vs. Bank*, 2 Annual, 371; *Bank vs. Barrow*, 21 Annual, 396. It has been said that a distinction may well be made between urban and rural estates in the minuteness and particularity of detail requisite for a proper and sufficient description of them, a greater accuracy being required for the former than the latter. *Bank vs. Denham*, 7 Rob. 39. And if a part of the description would mislead, it must be read with and be controlled by other parts which explain it. *Marcotte vs. Coco*, 12 Rob. 167. The error in the number of the range in the description in defendant's mortgage was cured by other descriptive parts thereof, which left no doubt of the particular tract that was intended to

be mortgaged. The mortgage of plaintiffs was judicial. The inscription of their judgment affected no land of Chaleson except that situated in Claiborne parish. The only land he had in that parish was bought from Brown, and was subject to the mortgage of defendant, which he had acquired by mesne conveyances from Brown, and which secured the payment of notes that represented the purchase-price of the land.

The other ground upon which plaintiffs rely is weaker than that just disposed of. It is that Pavy & Co. were the commission merchants of Chaleson, and their purchase of his notes was in reality a payment of them. On the contrary, the three sales of the notes by which the defendant eventually became their owner, were made by notarial act, with much formality and precision of style and statement, and conclusively negative any construction, such as that adopted by plaintiffs. It is not a matter of doubt upon a fact, nor is it an inference of law, or a legal presumption that we have here to deal with. The recitals in all three acts declare in explicit and unmistakable language what they were intended to be, and what they are.

The transcript of this suit is discreditable to the officer who prepared it, or had it prepared. Rule I. of this court prescribes with particularity how transcripts should be prepared. The directions to the clerks therein given can scarcely fail to be understood, and those rules are accessible to all officers of the courts. Ignorance alone does not explain or account for the preparation of this transcript. Its slovenliness can only be accounted for by negligence. The writing is not a fair and legible hand, the documents, with their superscriptions and filings, are crowded together in undistinguishable confusion, the order of succession in which the documents are placed, or rather the want of order and arrangement, perplex us at every step in its examination, and there is no note of evidence whatever. The Rule I. provides that transcripts not prepared in accordance with the directions therein contained will be returned, and a new one ordered to be made at the expense of the clerk whose duty is to make it. It may be necessary to enforce this rule hereafter.

The judgment of the court was for the defendant, and

It is ordered, adjudged, and decreed that the judgment of the lower court is affirmed with costs.

Mr. Justice Egan recused himself in this case.

No. 691.

THE STATE VS. J. H. LARTIGUE AND THOMAS WILLIAMS.

An indictment for stealing need not expressly designate the offense charged as grand or petty larceny.

The parish courts have jurisdiction, and hence have power to receive informations, in all criminal cases, when the offense charged is not necessarily punishable with death, or imprisonment at hard labor, and when the accused waives his right of trial by jury.

A mere opinion as to the guilt of the accused, unassociated with any bias, or prejudice, does not disqualify a person to serve as juror.

The judge is authorized, on his own motion, to strike a juror from a regular panel, if satisfied that the juror is morally unfit to return a just verdict.

A PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Parsons, J.* Trial by jury.

W. N. Potts, District Attorney, for the State and appellee.

Robert J. Caldwell and *Robert Ray*, for defendants.

The opinion of the court was delivered by

MARR, J. In March, 1877, the district attorney filed an information in the parish court of Ouachita against Julien H. Lartigue and Thomas Williams, who were in prison, in default of bail for their appearance at the next term of the district court, charging that they, at and in the parish of Ouachita, on the sixth of February, 1877, "with force and arms, one cow, of the value of fifty dollars, of the goods, chattels, and property of Robert Miller, then and there being found, feloniously did steal, take, and carry away." Warrants of arrest were issued on this information, and the accused being brought into court, both decided not to waive trial by jury.

At the ensuing term of the district court the accused appeared and filed separate motions to quash the information on the grounds:

First—That prosecution by information can not originate in the parish court, and must originate in the district court, which alone has power to try criminal cases by jury.

Second—That the accused could not be legally called on by the parish judge, in whose court the information was filed, to say whether they would be tried by the parish judge or by a jury, because the parish judge could not tender them a jury.

Third—That the law of the State of Louisiana makes a distinction between grand and petty larceny; and the information does not state whether the offense charged is grand or petty larceny.

Fourth—That by the law of the State the punishment is greater for grand than it is for petty larceny, thereby making two distinct offenses.

The two grounds last mentioned were taken by Lartigue alone, who also moved the court to grant him a separate trial on the ground that

29	642
44	570
29	642
46	208
29	642
51	246

his defense would be prejudiced if both the accused were tried together; and he also moved for a change of venue on the ground that he could not obtain an impartial trial in the parish of Ouachita by reason of the prejudice existing in the public mind.

Our attention has not been called, by bill of exceptions or otherwise, to any error of law in the ruling of the district judge in refusing these motions; and we can not undertake to review his decision in this respect.

The motions to quash having been overruled, the accused pleaded not guilty, elected to be tried by jury, and were convicted; and they have appealed from the judgment sentencing them to two years imprisonment in the penitentiary.

Four bills of exception, and the motions to quash, present the only questions which we can consider, and we shall dispose of them *seriatim*:

First—As to the objections based upon the distinction between grand and petty larceny, established by section eight of the act of 1874, p. 223, creating the Superior Criminal Court, but little need be said. This section declares that the crime of larceny shall be divided into grand and petty larceny. If the thing stolen be of the value of one hundred dollars or more, the crime is grand larceny, and the penalty is imprisonment in the parish prison, or at hard labor in the penitentiary, at the discretion of the court, for not more than ten years. If the value be less than one hundred dollars, the crime is petty larceny, and the penalty is imprisonment in the parish prison, or in the penitentiary, at the discretion of the court, for not more than two years. The mode of trial and all the proceedings are the same, whether the crime be grand larceny or petty larceny. The only difference is in the penalty. The word "larceny" is not used in indictments and informations. It designates the offense which is usually called stealing, and it is aptly charged in the information in this case by the words "*feloniously did steal, take, and carry away one cow, of the value of fifty dollars, of the good, chattels, and property of Robert Miller.*" It would not be possible to charge the crime of petty larceny, as defined in the statutes, more clearly; and the sentence is for the penalty appropriate to that crime.

Second—The other grounds of the motion to quash are based upon the supposed want of jurisdiction in the parish court.

By the constitution, article six, the right of trial by jury is secured to the accused in all prosecutions. Article eighty-five confers upon the district courts unlimited jurisdiction in criminal cases; and article eighty-seven provides that the parish courts shall have jurisdiction in criminal matters, "in all cases when the penalty is not necessarily imprisonment at hard labor, or death, and when the accused shall waive trial by jury." This article goes on to declare that the parish courts shall also have the power of committing magistrates, "and such other jurisdiction as may be

conferred on them by law," and that "there shall be no trial by jury before the parish courts."

It is obvious, therefore, that the parish courts have jurisdiction in criminal matters in those cases only in which the two conditions concur:

First—A charge not necessarily punishable by imprisonment at hard labor or death; and,

Second—The waiver by the accused of trial by jury.

As the district courts have unlimited jurisdiction in criminal cases, the restricted jurisdiction thus conferred upon the parish courts is necessarily concurrent with that of the district courts.

The word jurisdiction, as used in this article, eighty-seven, evidently means the power to hear and determine, *jus dicere*, to say what the law is; or, as article seventy-six of the Code of Practice defines it: "Jurisdiction means the power of him who has the right of judging." Substituting for the word "jurisdiction" the words "the right of judging," and the clause of article eighty-seven in question will read thus:

"In criminal matters the parish courts shall have *the right of judging* in all cases when the penalty is not necessarily imprisonment at hard labor, or death, and when the accused shall waive trial by jury." The penalty of larceny, whether grand or petty, is not necessarily imprisonment at hard labor, or death; and the authority which the Legislature has chosen to confer upon the parish courts to receive informations in the cases which may fall within their cognizance, to have the accused arrested and brought before them, and required to decide whether they will waive trial by jury, is no enlargement of their jurisdiction, their right of judging, nor is it in excess of legislative power.

This grant of jurisdiction to the parish courts necessarily assumes that the accused, in the class of cases specified, have the right to waive trial by jury; but it does not indicate the manner in which this faculty or right of waiver shall be exercised, nor how the decision of the accused shall be manifested. This deficiency is supplied by the act of 1868, No. 120, which in no way enlarges the jurisdiction, the right of judging; nor does it violate either the letter or the spirit of the constitution.

Section four of this act, p. 157, authorizes the district attorneys to file informations in the parish courts against all persons accused of crimes which may be cognizable in said courts, upon which it is made the duty of the parish courts to issue warrants for the arrest of the accused, and to fix the amount of the bail-bonds to be given by them.

Section five requires the accused, in all such cases, to appear, if under bond, or to be brought into court by the sheriff or other officer, if in actual custody, "and such accused shall, without being required to make any motion, plea, or answer to such information, first decide whether they will waive trial by jury." If they decline to waive trial by jury, the

proceedings are transferred to the district court, where the accused must appear and answer, just as if the prosecution had been commenced in that court.

By section six, if the accused shall decide to waive trial by jury, "the parish court shall *then* take cognizance of and proceed to try and determine the case."

In cases originating in the district courts, in which the penalty is not necessarily imprisonment at hard labor, or death, before the accused shall be required to file any motion, plea, or other defense, "he will be required to decide whether he will waive trial by jury; and if he shall decide that he waives trial by jury, the district court shall proceed to try the case;" and if, from any cause, the case is not tried at that term, the proceedings shall be transferred to the parish court, which shall take jurisdiction of and try and determine the case. Section seven, p. 158.

This act is a wise provision of law. It is necessary that some tribunal holding frequent sessions should have jurisdiction of criminal cases, minor offenses, in which the accused, if unable to give bail, may prefer a speedy trial, rather than remain in jail until the meeting of the district court, which holds but two sessions in the year; or in which, for any reason, the accused may choose to waive his unquestionable constitutional right of trial by jury, and to risk the finding and decision of the judge rather than that of twelve of his peers.

The proceedings in this case were strictly in accordance with the act of 1868. The information was properly filed in the parish court. The opportunity was afforded to the accused, as the law requires, to waive trial by jury and be tried at once by the parish judge, if that had been their choice and decision; and the case was transferred to the district court, and there tried and determined, because they chose and decided not to waive the right of trial by jury.

Third—The first bill of exceptions calls in question the correctness of the ruling of the district court in requiring the accused, when arraigned, to say how they would be tried, they having already, in the parish court, decided not to waive trial by jury.

We are at a loss to understand the object of this bill of exceptions, since no possible injury was done to the accused, nor were their rights in any manner impaired. Perhaps, as the prosecution did not originate in the district court, it was not necessary to ask the accused how they would be tried. But they elected to be tried by jury, they were tried by jury, and no attempt was made to induce them to forego the right so to be tried. If the prosecution had originated in the district court, the accused would have been required, *in limine*, to make their election, whether to be tried by jury or by the court. There was a time when there were several modes of trial, notably, by wager of *battel*, by the

ordeal of fire, by the ordeal of water, etc., and the form which was then necessary, on the arraignment of the accused, in order to give him his right of choice, has been preserved, though it is no longer necessary. It may be useless, without significance, but it can do no harm to the accused, to have the question put to him in solemn form: "How will you be tried?" and to require him, even when he must necessarily be tried by jury, to answer: "By God and my country."

Fourth—The second bill of exceptions is to the ruling of the court in declaring competent as a juror one Hudson, who, in answer to the usual question, whether he had formed or expressed any opinion as to the guilt or innocence of the accused, said: "I think, from what I have heard, the parties are guilty." The judge adds to this bill of exceptions that "the further examination of the juror on his *voir dire* showed that his opinion was not fixed, and predicated on rumor, and, in his opinion, could not influence his verdict."

We think the rule as stated in *Bunger's case*, 14 An. 462, is correct, that "an opinion predicated upon rumor, when there is no bias or prejudice in the mind of the juror, is not a disqualification," and that the judge did not err in deciding that Hudson was a competent juror. He was challenged, peremptorily, and did not serve in the case, and it is not shown that the accused exhausted their challenges, or suffered any injury from that ruling.

Fifth—The third bill of exceptions is to the *ex parte* action of the court in striking from the regular panel one of the jurors, Hayward Roach. The judge states that Roach was discharged for misconduct as a juror in a case which had just been tried. Other jurors had brought it to the attention of the court that Roach had, before being sworn as a juror, stated that he had not formed or expressed an opinion in the case as to the guilt or innocence of the accused, and, afterward, and to the other members of the jury, he admitted and stated that he had previously formed an opinion, and would not agree to a verdict contrary to that opinion. The judge had also been further informed that the same juror had promised the accused in that case not to bring in a verdict against him.

If the statements made to the judge, and upon which he discharged Roach, were true, and susceptible of proof, he should have been prosecuted at once, and should now be prosecuted without delay. It was the plain duty of the judge to strike his name from the list of jurors, and, we think, he should have ordered Roach into the custody of the sheriff. His presence was a pollution of the temple of justice; and he was better fitted to render the State service in the penitentiary than to sit in judgment as a juror on the solemn and momentous question of the guilt or innocence of his fellow-men.

State vs. Lartigue and Williams.

Sixth—The fourth bill of exceptions is by Lartigue alone, to the ruling of the court:

1. In taking up the case out of order, and in violation of the rules of court.

2. In calling the case without having first had it fixed for trial, and notice given to the accused. Before this objection being made the district attorney asked the judge to fix the case then, which was accordingly done.

3. In striking the name of Roach from the list of jurors; about which nothing more need be said.

The judge states that at the beginning of the third week of court, when the criminal docket was taken up, the court made a special rule requiring prosecutions against parties then confined in the parish prison to be taken up and first disposed of, the accused being then in jail, and the case being reached on the regular call of the docket.

There is no statement or complaint that the accused were denied, or that they asked for, any continuance or delay; nor that any witness in their behalf was not in attendance; nor that their means of defense was abridged or impaired; nor that they suffered any injury or prejudice from the action of the court.

We find no error in the judgment appealed from, and it is therefore affirmed with costs.

No. 724.

ADELINE EDWARDS VS. SAMUEL WHITED.

The clerks of the lower courts are authorized to record all decrees and mandates of the Supreme Court, made in cases originating in their courts, and to issue all legal processes necessary to the execution of such decrees and mandates.

A judgment of this court, rendered for or against a person dead, and not represented here, is an absolute nullity.

Any judgment absolutely null may be attacked collaterally, and by any one against whom it is sought to be enforced.

29	647
105	485
29	647
123	1013
1124	148

A PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Parsons, J.*

Cobb & Gunby, for plaintiff and appellee.

Robert Ray and *Garrett & Garrett*, for defendant.

The opinion of the court was delivered by

MARR, J. In October, 1867, Blanchin & Giraud, merchants of New Orleans, brought suit against Samuel Whited to recover a large sum due for advances and plantation supplies. They claimed a privilege on the

crops, mules, wagons, stock, and farming implements on the several plantations cultivated by Whited; and they charged that Armstrong and M. T. Edwards were removing the property which they claimed was subject to their privilege. They caused the property to be sequestered, and prayed for judgment against Whited, Armstrong, and Edwards, *in solido*, for the whole debt due by Whited. The property was released and delivered to Blanchin & Giraud on forthcoming bond.

Of the three defendants, Edwards alone, who was not indebted to Blanchin & Giraud, answered; and he claimed part of the property as owner, in virtue of a purchase from Armstrong; and asserted the lessor's privilege on part, for the rent of a plantation leased by him to Armstrong. The record does not show that either Armstrong or Whited made any appearance; nor that any judgment by default was taken against them.

The judge recused himself; and the case was tried by a lawyer selected by him for that purpose; and judgment was rendered in favor of plaintiffs, against Edwards, maintaining the sequestration, except as to seven bales of cotton, decreed to be the property of Edwards, and ordered to be delivered to him. This singular judgment, which does not condemn any one to pay any sum of money, and in which no one is mentioned as defendant but Edwards, was rendered on the tenth of November, 1870; and was signed on the twenty-sixth of September, 1871. Blanchin & Giraud took a suspensive appeal; and Whited was their surety on the appeal bond.

The record of appeal is missing; but we learn from the minutes that a decree was rendered in July, 1872, affirming so much of the judgment as declared Edwards to be the owner of the seven bales of cotton. In other respects the judgment was reversed; and the lessor's privilege was awarded to Edwards on a portion of the property sequestered, and a concurrent privilege with Blanchin & Giraud on the remainder. A rehearing was granted, and the court adjourned without disposing of the case.

Edwards died in September, 1872, and his widow qualified as administratrix before January, 1873. No suggestion of the death was made in the Supreme Court, as far as we can discover; and at the July term, 1873, the decree rendered at the July term, 1872, was set aside, on the rehearing; and a final decree was rendered, simply affirming the judgment appealed from.

On the sixteenth of March, 1876, a writ was issued on this judgment, commanding the sheriff of Ouachita parish to take into his possession the seven bales of cotton sequestered, declared to be the property of Edwards, and to deliver the same to Edwards or his heirs and legal representatives. Of course the sheriff could not find the cotton, which

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went into the possession of Blanchin & Giraud nearly nine years before; and his return shows that Blanchin & Giraud did not reside in the parish of Ouachita; and that neither Whited nor the legal representative of Edwards could point out the cotton, nor any property belonging to Blanchin & Giraud.

On the twenty-sixth September, 1876, this suit was brought by the administratrix of M. T. Edwards to recover of Whited, surety in the appeal bond, the seven bales of cotton or the alleged value, eight hundred dollars.

Whited excepted on several grounds, one of which, only, we shall notice; and that is, that the mandate of the Supreme Court was not filed in the district court, and no order of court was obtained upon which to issue a *feri facias*; and the clerk can not issue a *feri facias* before these formalities are complied with. This is a mistake, and we notice it to prevent any misapprehension of the law on this subject in future. By the act of 1855, page fifty-one, section five, the clerks of the district courts have power "to receive, file, and record all mandates and decrees rendered by the Supreme Court, and to issue all legal process thereon." This section is re-enacted in the Revised Statutes of 1870, section 464. When the mandate of the Supreme Court is sent to the clerk of the district court, it is his duty to receive, file, and record it; and to issue the proper process, when required to do so by the party entitled, or his attorney.

The defendant answered, charging that plaintiff had been guilty of laches in not pursuing Blanchin & Giraud promptly; and by a supplemental answer he set up the nullity of the decree of the Supreme Court rendered in July, 1873, upon the ground that Edwards died in September, 1872, pending the appeal; and his heirs and representatives were not made parties.

There was judgment in favor of plaintiff against Whited for \$787 50, the value of the seven bales of cotton. Whited took a suspensive appeal; and the plaintiff, in her answer, prays for the affirmance of the judgment, with one hundred dollars damages for a frivolous appeal.

It was proven that Blanchin & Giraud obtained an extension of time from their creditors in August, 1873; that Blanchin died in August, 1874; that the firm became insolvent in 1875; and was in bankruptcy in 1876; and it was admitted that M. T. Edwards died in September, 1872, and that his widow was appointed administratrix prior to first of January, 1873.

Several bills of exception were taken by defendant; but we shall notice one only; and that is to the ruling of the court in refusing to allow him to prove that Edwards was dead when the decree of the Supreme Court was rendered, affirming the judgment in Blanchin & Giraud vs. Whited and others, at the July term, 1873. The objection was that the nullity

of the decree of the Supreme Court could not be set up nor proved by the defendant, as surety in the appeal bond, nor attacked in a collateral manner.

If a judgment is an absolute nullity, it can not be enforced; and the nullity can be invoked by any one against whom the attempt to enforce it is made; and no valid judgment can be rendered for or against a dead man. The rules of this court provide for cases in which the death of a party occurs pending the appeal; and it may not be out of place to state what these rules require:

If the proper representatives of a deceased party come in voluntarily they will be admitted parties at any time.

If the appellant die pending the appeal, and his representatives be known and reside in the State, the appellee may, on affidavit, obtain an order to summon them to appear within twenty-five days; and in default of their appearance, after due return of service, the appellee may have the appeal dismissed, or have the cause heard and determined.

If the representatives of the deceased appellant be not known, or do not reside in the State, on proper affidavit, the appellee may obtain an order, and give them notice to appear, within three months, by publication in a newspaper printed at the seat of government, or at the place where the court sits; and upon proof of such publication, in default of appearance, the appellee may have the appeal dismissed, or the cause heard and determined.

If the appellee die, pending the appeal, the appellant may, in like manner, have his representatives, if they are known and reside in the State, summoned to appear, within twenty-five days; and in default of appearance, after due return of the service, the appellant may proceed to have the cause heard and determined.

If the representatives of the deceased appellee be not known or do not reside in the State, the appellant may, in like manner, give notice by publication; and if they do not appear after the expiration of three months, on proof of publication, the appellant may have the cause heard and determined. See rules of court at the end of 17 An., amendments 111.

In such cases the proper representatives are summoned or notified to appear; and the cause proceeds, as in other cases, as if the parties so summoned or notified had actually appeared.

We take occasion to say, that counselors of this court should, when they have knowledge of the death of a client, party to a cause pending, inform the court, and have the suggestion of death made of record, so that the court may not do so vain a thing as to pronounce a void decree. If no such suggestion is made, the court, ignorant of the death, will proceed of course; and there may be delays, and confusion, and much use-

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less litigation, which a prompt suggestion of death would avoid. We do not hesitate to say, that a decree of this court for or against a person no longer in existence, is an absolute nullity; and that the nullity may be shown by any person against whom the attempt is made to enforce it.

The court below should have allowed the proof of the death of Edwards; and of the failure to make his legal representative a party in his stead; and, if it were necessary, we should remand the case to enable the defendant to make this proof.

But we know, from the entries in the minutes, that the appeal was pending, on rehearing, at the end of the July term, 1872; and that the final decree was rendered at the July term, 1873. It was admitted on the trial that Edwards died in September, 1872; and no steps were taken to have his legal representative made a party. In reality, the case is still pending, on the rehearing, because the court had no power to proceed after the death of Edwards. The decree of July, 1873, is an absolute nullity; and the judgment appealed from is suspended, and can not be enforced, until the appeal is disposed of, contradictorily with the legal representative of Edwards, the deceased appellee.

Without noticing the other points raised in the pleadings, and discussed orally and by brief, it suffices to say that the pleadings and proof do not authorize the judgment appealed from; nor do they show any present right of action against the defendant as surety on the appeal bond.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; and that there be judgment in favor of defendant, appellant, against the plaintiff, appellee, as in case of nonsuit, with costs in both courts.

No. 480.

THE MAYOR AND CITY COUNCIL OF MONROE VS. JOSEPH HOFFMAN.

Where by the charter of a municipal corporation it is provided that a vacancy in the office of mayor shall be filled by election, the Governor can not legally fill such vacancy by appointment, in virtue of a general law authorizing him to fill vacancies in municipal offices.

The power of an illegal, but *de facto* mayor of a city (who acts under color of a legal appointment), to represent the city in a legal proceeding, can not be called in question collaterally.

The power to forbid the erection, and compel the removal of buildings formed of combustible materials, within the densely-built-up parts of a town, inheres in municipal corporations, and hence does not depend on any legislative grant.

A PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. Ray, J. Trial by jury.

W. W. Farmer, City Attorney, for plaintiff and appellee.

Cobb & Gunby, for defendant.

The opinion of the court was delivered by

HOWELL, J. This is a suit to compel the defendant to remove a wooden building erected within what is known as the "fire district" in the city of Monroe. The defendant excepted to the capacity of the mayor for want of the qualifications to hold said office and the right of the Governor to make the appointment of the mayor or the councilmen.

The right to an office, it is long since settled, can not be thus collaterally raised, and the judge *a quo* did not err in overruling the exceptions.

The answer presents a three-fold defense:

First—The mayor and trustees of the town of Monroe had no power, express or implied, to adopt ordinance No. 19, of October 6, 1870, creating the *fire district*, and said ordinance was null and produced no legal effect.

Second—The ordinance No. 56, adopted the third of January, 1872, by the mayor and council of the city of Monroe, suspending the effect of the above ordinance No. 19, did not give vitality or validity to the latter.

Third—If these propositions be unsound, the charter of Monroe, of May 4, 1871, does not confer the power to remove or destroy wooden buildings once erected in the fire district, without compensation, and the corporation could not compel its citizens to enter into a contract to take down the buildings on a certain day.

First—The plaintiffs consider that the town of Monroe was never empowered by express words to establish fire limits and to prevent the erection of wooden buildings therein; but they contend that this power is fairly implied in the powers expressly granted by the various acts of the Legislature incorporating the town, and that such power is necessary to the objects and purposes of such corporations.

By a clause in article 433, R. C. C., corporations may "enact statutes and regulations for their own government, provided such statutes and regulations be not contrary to the laws of the political society of which they are members."

By the various charters prior to that of May 4, 1871, the mayor and trustees of the town of Monroe were empowered to adopt all rules, ordinances, regulations, and by-laws for the general government, improvement, and police of the town, and prescribe the manner of enforcing them, not contrary to or inconsistent with the constitution and laws of this State and the United States. See acts of 1855, p. 189, sec. seven; acts 1859, p. 215, sec. fifteen; acts 1866, p. 130, sec. nine.

It seems to us clear that where a municipal corporation is vested with such powers, and the compactness of its construction would increase the hazard of conflagration, the corporate authorities may fix what is known as a fire district and forbid the erection of wooden buildings

Mayor and Council of Monroe vs. Hoffman.

therein. No town or city, compactly built, can be said to be well-ordered or well-regulated which neglects precautions of this sort. It is its duty to the public to take such measures as may be practicable to lessen the hazard and danger of fire. The public good and safety are superior to the individual rights of the inhabitants, and under this principle such regulations are not the divestiture of the individual right of ownership and use, but is only conforming the use of individual property to the necessities, safety, and interests of the public. It is a regulation of its enjoyment.

A similar construction of the powers of such corporations has been adopted in some of our sister States. See 2 Yeates (Penn.), 498; 11 Mich. 425; 7 Cowen (N. Y.), 352; 3 Fairfield (12 Maine), 403.

We think the town of Monroe had authority to enact ordinance No. 19, of October 6, 1870, and hence the second proposition falls.

We may add, however, that the want of authority is not, under any correct rules of interpretation, so clear as to make the ordinance an absolute nullity and incapable of confirmation, and the ordinance No. 56, of the third of January, 1872, had such effect *if needed*.

Third—Does the charter of 1871 confer the power to remove wooden buildings after being erected within the fire district?

We think this a corollary of the first proposition. The power to prohibit includes the power to undo what is done in contravention of the prohibition. "A satisfactory and lawful regulation may otherwise be defeated and rendered ineffectual. The removal is made to prevent the hazard of the continuance of the combustible matter in a dangerous position, and not with the view to punish the wrong-doer or subject him to loss. If he thereby sustains a loss, it is the direct consequence of his unlawful act, of which he has no right to complain." 3 Fairfield, 403.

The objection that the mayor and city council could not, as is done in ordinance No. 56, give permission to build temporary wooden buildings and require their removal at a fixed date has no force.

If they had the power to prohibit entirely, they had the power to modify the prohibition. The greater includes the less. This is a matter of legislation and not of contract. The prohibition existing, they had the power to suspend it for a limited period for the benefit of the public. Those who built after the passage of said ordinance built with a knowledge of the condition imposed, and, it being a legitimate condition, they were bound by it.

We think the action is maintained.

Judgment affirmed.

ON REHEARING.

The opinion of the court was delivered by

MARR, J. The exceptions filed by defendant in this case depend upon the solution of two questions:

First—Was George B. Hamlet mayor of the city of Monroe?

Second—Are the plaintiffs capable of standing in judgment in this suit?

First—J. L. Hunsicker, who was mayor of Monroe, died in July, 1873, and the Governor appointed and commissioned Hamlet to fill the vacancy. Defendant maintains that Hamlet was not mayor: First, because he was not a qualified voter of the city of Monroe; and, second, because the office was elective, and the act of incorporation required any vacancy occurring by death or resignation to be filled by election.

By the acts incorporating the town of Monroe—1855, 1859, 1866—the mayor and trustees were to be elected by the qualified voters of the town or corporation "*from among themselves*;" and by the act of 1871, by which Monroe was incorporated under the name of "the Mayor and City Council of Monroe," the mayor and councilmen were to be elected by the "*qualified voters of said corporation from among themselves*," section two, page 237.

Hamlet registered as a voter in Tensas parish in September, 1872; but he testified that he had not registered in Ouachita parish. It is manifest, therefore, that he had not the requisite qualification; and that he could not have been legally elected mayor of the city of Monroe.

The several acts incorporating first the town and then the city of Monroe provided for the filling of any vacancy in the office of mayor, etc., by election. By the act of 1859, section twenty-five, page 219, "in case of the death or resignation of the mayor, a new election shall be ordered by the board of trustees within twenty days from such demise or resignation."

By the act of 1866, section five, pages 130 and 131, in case of a tie vote at the election, or of the death or resignation of the mayor or other municipal officer, the clerk of the district court or his deputy shall order an election, giving notice for ten entire days; and this mode of filling vacancies is embodied and re-enacted in the act of 1871, sections four and five, page 238.

The act of 1868, page twenty-seven, a general law, authorizes the Governor to fill vacancies in State, parish, and municipal offices. Of course this general law did not repeal the special law, the act of 1866, then in force; nor could it, in any manner, impair the act of 1871 incorporating the city of Monroe and providing specially for filling all vacancies in the municipal offices.

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It is manifest that Hamlet was not lawfully mayor of Monroe, because he had not the requisite qualifications, and because the Governor had no power to appoint him mayor. This appointment was merely one of the long series of usurpations to which the people of Louisiana have been compelled to submit; and it was in flagrant violation of the express terms of the several statutes incorporating first the town and then the city of Monroe.

The Legislature saw fit, by act of 1874, page seventy-five, to amend section five of the act of 1871 so as to authorize the Governor to fill the vacancies which the act of 1871 required to be filled by election; but this act of 1874, of course, had no retroactive effect; and it could neither legalize nor excuse the unwarranted assumption of power by which the inhabitants of Monroe were deprived of their chartered right and franchise of electing their mayor; and were compelled to accept for that responsible office a colored adventurer from the State of Ohio, who, according to his own testimony, had been in the parish of Ouachita but five months and was less than twenty-three years of age at the date of his commission.

This question has been pressed upon us, and we have felt compelled to notice in some way the wrong to which the people of Monroe were subjected by this appointment in violation of the organic law of the city, the act of incorporation. But Hamlet was mayor in fact; no other person claimed the office; and his commission gave him a color of title. We think that the authority of one who assumes the powers and functions of an office, under a commission appointing him to that office, can not be questioned, judicially, otherwise than in a direct proceeding to oust him.

Second—The act of 1871, page 238, section eight, gave to "the mayor and city council of Monroe" perpetual succession, with authority to sue and be sued under the title of "the mayor and city council of Monroe." This suit was brought in the name of "the mayor and city council of Monroe," and the mayor and councilmen are mentioned by name, without necessity. This may be rejected as surplusage. It was the suit of the corporation by its corporate name; and it continues to be the suit of the corporation, without regard to any changes that may have since occurred in the *personnel* of the municipal officers.

Third—The answer of the defendant requires us to decide whether the corporation had the power to establish a fire district and to prohibit the erection of wooden buildings within that district.

On the sixth of October, 1870, the ordinance No. 19 was adopted, by which it was declared that none but fire-proof buildings should be erected within certain defined limits. At that time no express authority had been granted to the corporation to enact any such ordinance, and

it was not expressly granted until 1871. There has been great diversity of opinion as to the power of municipal corporations to restrict the right of property, by forbidding the owner to put up such buildings as he may choose, that is, of such materials as his taste or convenience may induce him to prefer; but we have no hesitation in saying that such regulations, applicable to cities and towns compactly built, fall within the police power of municipal corporations; and the maxim *sic utere tuo ut alienum non lædas* forbids the owner so to use his property as to imperil that of his neighbors, or to endanger their lives or their health. We think a municipal corporation might, without a special legislative grant of power to that effect, prohibit the erection of works and factories, and the pursuit of industries within the corporate limits, which would be injurious to the public health and destructive of the comfort of the inhabitants, by subjecting them, in the crowded streets, to nauseous smells and sickening odors; and the right to prohibit the erection of structures of wood and other combustible materials in the compactly-built parts of a city or town, by which the property of the other inhabitants would be subjected to constant risk of fire, falls within the same general police powers, and exists and must exist, *ex necessitate*, without special legislative authority.

By the act of 1871 the Legislature specially granted certain enumerated powers to the mayor and city council of Monroe, among others the power "to determine in what part of the city wooden buildings should not be allowed to be erected." P. 240, sec. nine.

On the thirty-first of December, 1871, a fire occurred by which the greater part of the business houses, the most valuable buildings in Monroe, were destroyed. On the third of January, 1872, the mayor and council met, and in accordance with the wishes of the inhabitants, as expressed at a mass-meeting of the day before, passed an ordinance, No. 56, by which the ordinance No. 19, of the sixth of October, 1870, was suspended as to its operation and effect until the first of November, 1873; and all persons desiring to erect temporary wooden buildings within the burnt district were permitted to do so; the buildings not to exceed the cost and value of one thousand dollars, the owners to give bond in the penal sum of five hundred dollars in favor of the mayor and city council to remove such buildings on or before the first of November, 1873.

We attach no importance to mass-meetings as a sanction or source of legislative power, whether State or municipal; but the action of the citizens and the proceedings of the municipal government may serve to show the popular opinion that the ordinance No. 19 was a proper and legitimate restriction of the right of property, which they did not desire to abrogate, but simply wished to have suspended in view of the neces-

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sity of supplying by temporary structures the buildings destroyed by fire; and the ordinance No. 56 was, in effect, a re-enactment of ordinance No. 19, with a postponement of its operation until a fixed date at which it should be enforced.

On the twentieth of October, 1873, the mayor and city council passed an ordinance authorizing the removal by the police force of the temporary wooden structures thus erected in the burnt district, and also requiring the city attorney to bring suits to compel the removal. This ordinance also authorized the city attorney to grant a stay of execution until August, 1874, in favor of such persons as might confess judgment in these suits.

We think this was in every respect proper; and we do not appreciate the argument of defendant's counsel that this was a partial law and not uniform in its operation. All who might choose to confess judgment would have a stay of execution until August, 1874; and those who might choose to litigate, and to compel the corporation to establish its right and enforce its authority by suit, could not complain of the terms granted to those who confessed at once that right and authority.

Defendant was bound by the ordinance to remove his structure on or before the first of November, 1873. This suit was brought on the twenty-fourth of February, 1874, and by the suspensive appeal taken by the defendant he has prevented the execution of the judgment against him for nearly three years beyond the term granted to those who confessed judgment.

Defendant having refused to remove his wooden building, erected under ordinance No. 56, of the third of January, 1872, nothing was left to the corporation but to enforce the removal by suit, which was brought more than three months after the expiration of the delay granted by the ordinance.

The judgment of the court below was in favor of plaintiff and in accordance with the prayer of the petition; and it was affirmed by our predecessors. We concur in their conclusions, and shall not disturb their decree.

The judgment appealed from is therefore affirmed with costs.

29 658
106 632

STATE EX REL. H. W. KNEELAND VS. THE CITY OF SHREVEPORT.

A mandamus will not lie to compel the mayor of a city to perform a duty which belongs solely to its common council.

The service of the writ of mandamus must be on the special officer, or officers of the municipal corporation, who are legally required to do the thing demanded.

A PPEAL from the Tenth Judicial District Court, parish of Caddo.
Looney, J.

Land & Taylor, for relator and appellee.

T. Alexander, City Attorney, for defendant.

The opinion of the court was delivered by

DEBLANC, J. On the twenty-first of August, 1872, plaintiff sold, to the city of Shreveport, three lots of ground, with the improvements thereon. That purchase was made under an ordinance adopted by the council and approved by the inhabitants of that city, at an election held to ascertain their will in regard to the intended acquisition. The price of that sale constitutes a debt, which, now, can not be successfully contested by the council. That is admitted.

As a corporation, that city is nearly insolvent. The assessed value of the property of its inhabitants is of a little more than two millions of dollars, its liabilities exceed two hundred thousand dollars. Including the interest on its outstanding bonds, the detailed estimate of its expenditures for 1877 is within a fraction of forty-seven thousand dollars. Exclusive of interest and costs, the judgments already rendered against it amount to more than fifty thousand dollars.

To its creditors and its inhabitants, the financial condition of Shreveport ought to be a just cause of anxiety and alarm, and they should have realized that there are circumstances and situations, in presence of which the law itself and the decrees of courts are powerless, and which they can not change. The debtors should not attempt to conceal to themselves the sacrifices, the losses, the troubles which a judgment may entail upon them; the creditors should not forget that many a writ has been returned unsatisfied, and lay in many a file, silent witness of a barren effort to recover a claim.

In this case, what is the parties' attitude? What is demanded and what denied? The creditor stands before us, with a judgment in his hand, and prays that a mandamus issue commanding the payment of that judgment. The debtor answers, I acknowledge your claim, but my treasury is empty, and, under the law, I can only impose and collect an amount of taxes indispensable to my existence as a corporation.

Under the judgment, the rights of plaintiff are fixed, irrevocable, undisputed. How shall his judgment be executed? How shall his rights

State ex rel. Kneeland vs. City of Shreveport.

be enforced? So far as concerns the validity of the claim, it is evident we can not look behind the judgment; but, as it does not provide for its own execution, it is as evident, to supply that omission, we must refer to the parties' contract, to the ordinance which authorized that contract.

The ordinance which relates to the mode of payment of plaintiff's claim, is as follows:

"Be it further ordained that, in order to carry out the provisions of this ordinance, city bonds—*such as are authorized by the city charter*, be issued and negotiated for the purchase of said property.

"Be it further ordained that a tax for such amount as may be necessary, be levied annually, on all property of every kind in Shreveport, in order to pay the interest on said bonds, and to provide a sinking fund for their redemption."

By the charter, the common council was empowered to issue "bonds of the city, running forty years, with interest coupons attached, and bearing interest at the rate of, and not exceeding ten per cent, etc." These are the bonds alluded to in the ordinance which authorized the purchase by the city of the lots of ground belonging to plaintiff. That ordinance and the section of the charter which empowered the council to issue the forty-years bonds, are inseparable from, and constitute an important part of the contract of the twenty-first of August, 1872.

Under that contract, how did the taxpayers of Shreveport bind themselves to pay to plaintiff the price of his property? By the negotiation and with the proceeds of the forty-years bonds. The price of the sale was six thousand dollars, one-half of which was paid by draft, on the day the act of sale was passed; the balance is represented by two notes of each fifteen hundred dollars, due one in sixty, the other in ninety days from their date, with interest. These terms do not appear to be those of the ordinance of the twenty-sixth of June, and, nevertheless, that ordinance is specially referred to in the act of sale, as the instrument from which the mayor derived the authority to represent the city in said act.

We entertain no doubt that plaintiff was aware of the nature and extent of the authority delegated under and by the ordinance, and he could not, legally, even with the consent of the mayor and council, have changed the mode of payment previously fixed between him and the taxpayers of Shreveport. The relator was to be paid with the proceeds of bonds, and as soon as those proceeds would be realized.

As then contemplated, have the bonds been issued? If they have, were they negotiated? If negotiated, what proceeds were realized and how were they applied? The time within which the price of the property was to be paid has certainly arrived, and it was for the city to show what became of the means provided for the payment of the stipulated

price. An appropriation was made to settle for the interest on bonds, but on what bonds? We are left to infer.

Defendant pleads that the relator's action is premature. that plea can not prevail. To sustain it, we would have to disregard the parties' intention, their contract, and the facts disclosed on the trial. At the date of the sale, neither the vendor nor the vendee's agent thought, and much less did they agree, that the payment of the price fixed between them, could have been postponed until 1877. In their estimation, the term of the promised payment was the space of time required to prepare and negotiate the bonds.

That term was fixed at ninety days from the date of the sale. That delay has long since expired. The draft representing the cash payment of three thousand dollars, acknowledged by plaintiff in the act of transfer, was protested and returned to him, and, of the price stipulated, he has received but the proceeds of the seizure and sale of his property. The balance he has demanded in vain. The sheriff's return on the last execution issued on Kneeland's judgment clearly indicates that another demand, another execution would be as barren, as useless as the first.

Is he entitled to the writ of mandamus?

His counsel contends that, now, there is no limitation to the city's power of taxation to pay its debts; that the law of 1874 contained an express amendment of section eleven of the act of 1871, which fixed at one and three quarters per cent the rate of taxation in the city of Shreveport. That the law of 1874 was repealed by an act of 1876, and that, under the present legislation, the council can levy a tax equal to the indebtedness of the city.

The act of 1874 did not repeal the act of 1871. The sixteenth section of the first of said acts reads as follows: "And it is furthermore enacted that wherein any provision of section eight of act No. 98 of 1871, to the contrary notwithstanding, which is hereby repealed, so far as it may conflict with the provisions of this act." The seventeenth section provides "that all laws or parts of laws in conflict with this act be and the same are hereby repealed, so far as they are in conflict."

Section eight of the act of 1871 fixes the date when the administrators of the city departments shall make their report, what salary they shall receive, when their offices shall be opened for the transaction of business. Section thirteen of the act of 1874, far from repealing, re-affirms section eleven of the act of 1871, which limits the rate of taxation to one and three quarters per cent; it reads thus: "That the city council, after the adoption of the estimate in accordance with section eleven of the act of 1871, shall proceed to levy the annual tax, etc."

The fourteenth section of the act of 1874 declares not applicable to the city of Shreveport the general law of the State limiting the power of

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taxation by towns, parishes and corporations. The main object of that law was to authorize and empower the council to levy an additional tax, for the purpose of defraying the police expenses of 1874; but it did not remove the limitation to the rate of taxation.

Plaintiff sold his property to the city of Shreveport, with the full knowledge that, under its charter, the rate of taxation which it could not exceed, was one dollar and seventy-five cents on every hundred dollars of the valuation of the property of its inhabitants. He knew that bonds were to be issued and negotiated to pay him, and should have foreseen that, if the bonds were not discounted, or their proceeds misapplied, his only recourse would be against that fraction of the tax levied at the aforesaid rate to pay the debts of the city.

He conceives that we may amend the judgment of the lower court and order the levy of a special tax to satisfy the whole of his claim. As against an ordinary debtor, and under a proper contract, his demand would not be extravagant or unjust; but, as against a corporation and under the express and tacit stipulations of his contract, that demand can not be allowed. The charter limitation is neither directly nor impliedly repealed by the special authority to buy for, and bind the municipality for the purchase price, unless the intention to ignore and exceed the limitation be clearly expressed in an ordinance, and that ordinance submitted to and ratified by the taxpayers.

In this case, the vendor was to be paid from the proceeds of bonds; but, as to the taxpayers, their obligation was that the bonds, from the negotiation of which the price of the sale was to come, would be redeemed and satisfied by them in but one way: by taxation, and under the limitation, then or to be hereafter fixed in and by the charter. That price, as to the vendor, was to be made in not more than ninety days; the term of the taxpayers' obligation was and remains the term stipulated for the redemption of their bonds.

Conceding, says defendant's counsel, that the city has not already exhausted its powers of taxation, then the issue is here directly presented and broadly made, that, there is no law of this State under which an ordinary judgment creditor of a municipal corporation can compel, by mandamus, or otherwise, the municipal authorities to levy and collect a special tax to pay his judgment.

Were it so, when positive law is silent, an appeal must be made to natural law and reason; but it is not so. "When the creditor's claim is reduced to judgment, the duty to provide for its payment becomes perfect, and if it can be paid in no other way, it must be done by the levy and collection of a tax for that purpose, and this duty will be enforced by mandamus." Dillon on Corp., p. 780, and note to p. 776; C. P. 830.

"The power of municipal corporations to make contracts and to create

liabilities has been already considered, and this authority imposes the duty of providing for the payment of those liabilities in the special mode prescribed by law; and if no such mode is prescribed, then by the levy and collection of taxes under the provisions of the charter or other legislative act. Whether the duty to provide for the payment of the liabilities of the corporation be specially enjoined, or whether it results from the general powers and nature of the corporation, it may, in all proper cases, be enforced by mandamus." Dillon on Corp., No. 685 and note.

Is this a proper case? It is, but not to the extent claimed by plaintiff. In the detailed estimate of the city's liabilities, his judgment is not included. In the detailed estimate of appropriations, the existence of his judgment is again and willfully omitted. This is wrong. His rights are fixed by a decree, and he should have been classed as one of the acknowledged creditors of the city. As such, he is entitled to and should be allowed a proportionate share in any and every surplus of funds which may remain in the treasury, after payment of the expenditures indispensable to the government of the city.

Plaintiff's remedy is by mandamus, but to whom should the writ be directed? Is it to the mayor? He has no power to levy or order the levy of any taxes; that power, by the charter, is vested in exclusively, the city council. The mayor alone is before us; not a member of the council has been cited. To grant the writ against the mayor, to command him to fulfill a duty not attached to his office, and expressly attached to the council's office, would be to command a violation of the law. Acts of 1871, p. 222, sections ten and eleven; R. C. C. 438; C. P. 119, 112.

In suits against the corporation of cities, the services of the citation must be made on the mayor, or any officer exercising similar functions; but the mandamus can be addressed to only those who have failed or refused to perform a duty, and who *alone can comply with the order of the court*. C. P. 834.

"If a joint act is to be performed by two or more, the writ must be directed to all." "In some cases, there is an option to direct the writ either to that part of the corporation which has the power to execute it, and on which alone that particular duty rests, or to the whole corporation by its corporate name or title.

"The writ, as we have seen, must be directed to those who are to execute it, or do the thing required, and it must be *delivered to, or served upon* those who are to make the return. Whether the writ be directed to the corporation or the council, the service ought to be made upon the officers who, under the law, have the power to do the act commanded, and against whom an attachment may issue to enforce obedience." Dillon on Corp., No. 699, 703, 704.

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Whatever may be the rights of the plaintiff, the parties against whom alone they may be exercised and enforced are not before us.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be and it is hereby annulled, avoided and reversed. It is further ordered, adjudged and decreed that plaintiff's action be and it is hereby dismissed as in case of nonsuit, and at his costs in both courts.

Rehearing refused.

No. 751.

W. W. BENNETT vs. J. W. FULLER.

29	663
111	784
29	663
117	993
29	663
122	113

After the dissolution of the community, the husband, as its former head, has no power to sell, and can convey title to no greater part of the community property than his undivided half-interest in it.

An agreement to sell property for a certain price, on a certain future day, and convey a clear title to it, is not a sale, but a promise to sell; and if the one who so promises fails to fulfill his agreement, he releases the other party to the agreement, and becomes liable for whatever damages his breach of compact has caused the latter.

The tender by one party to a commutative contract to perform his part of it, made long after the time fixed for its performance, is too late to put the other party in default.

A PPEAL from the Tenth Judicial District Court, parish of Caddo. *Looney, J.*

Nutt & Leonard, for plaintiff and appellee.

Hicks & Hicks, for defendant.

The opinion of the court was delivered by

DEBLANC, J. In November, 1872, plaintiff and defendant entered into the following agreement:

"The undersigned, J. W. Fuller, of Caddo parish, and W. W. Bennett, of Claiborne parish, Louisiana, have this day agreed as follows: Said Fuller agrees to sell to said Bennett and convey by formal title, free from all incumbrances, the dwelling, out-buildings, and improvements, and the grounds whereon they are situated, known as the Graham Place, on Fairfield Avenue Railroad, in the city of Shreveport, fronting upon the avenue and railroad one hundred feet and running back to the east end of said property, of same width perpendicularly to the back line, for which said Bennett agrees to pay on the first of January, 1873, four thousand dollars, on execution of the title.

"(Signed)

J. W. FULLER,
W. W. BENNETT."

To what, by this agreement, was defendant bound? To convey to plaintiff, free from all incumbrances, a lot of ground and the improve-

Bennett vs. Fuller.

ments thereon. When was said property to be so conveyed? On the first of January, 1873.

These were the obligations of defendant's contract. What were those of plaintiff?

To accept and complete the promised sale, and to pay to defendant, on the first of January, 1873, four thousand dollars, the price stipulated between them.

Thus, as to both parties, the term fixed for the performance of their contract was the first of January, 1873.

On that day J. W. Fuller was to execute and tender to W. W. Bennett a title *free from all incumbrances*. Did he comply with his obligation?

On the same day W. W. Bennett was to pay to J. W. Fuller four thousand dollars. Did he pay, and, if he did not, why?

On the first of January, 1873, no title was executed by defendant, no title was tendered by him to plaintiff. He only offered to give what he considered as a good one, and to warrant its validity by personal security.

This did not amount to a compliance with his obligation. Could he, then, have complied with it, and can he now do so?

On the first of January, 1873, there was, and there is now, on the property hereinbefore described, in favor of one Lester, a conventional mortgage amounting, in principal, to \$5637 20; and then, as now, the minor, Mary S. Buckner, was and continues to be, by inheritance from her mother, the owner of one *undivided* half of said property.

That mortgage and that adverse title, were the causes, the obstacles, which prevented defendant from complying with his obligation. He could not and did not, on the first of January, 1873, do what he had bound himself to do on that day. His failure to comply with his written promise, constitutes, in law and in fact, a violation of his contract.

With the consent of defendant, indispensable repairs were made to the buildings on the lot, under the instructions and at the costs of plaintiff, and this suit is brought by the latter to compel the former to reimburse the amount of those costs, with legal interest.

The district court allowed plaintiff's demand, and defendant has appealed.

If we had under consideration, instead of a promise to sell and to buy, a sale transmitting a title, or even translati^{ve} of a title, the argument of defendant's counsel would be unanswerable; but a conditional promise to sell transfers neither the property nor its possession, but only gives, when the condition is fulfilled, a right of action for its performance or for damages. 10 An. 160; 13 An. 361.

It has been held that one who acquired from a vendor without title,

has just reason to fear that he shall be disquieted, and may suspend the payment of the price, unless, before the sale, he was informed of the danger of eviction. It would have been a grave iniquity to hold otherwise, as, here and elsewhere, the sale of property belonging to another is a nullity.

We have been referred to the decision of this court in the case of *Julia Williams and husband against J. W. Fuller*, reported in the 27 An. p. 634, in which it was maintained that the surviving husband, as head of the community, may sell its property, after the death of the wife. This is not correct; at the dissolution of the marriage the effects composing the community of gains, are divided into two equal portions, between the husband and the wife, or between their heirs. R. C. C. 2406.

In the case of *Broussard vs. Bernard et al.* this court said: "That a community of acquets and gains, as such, continues after the death of one of the partners, with all the legal effects resulting from such a relation, with authority in the husband, if he should survive, to be still regarded as the head of the community, with power to bind the common property by his contracts, and to alienate it without restraint, is a proposition so repugnant to all our notions of a community, and so subversive of first principles, that it can not be for a moment admitted. Each party is seized of one undivided half of the property composing the mass, and the surviving party can not validly alienate the share not belonging to him." 7 L. R. 222.

In the case of *German vs. Gay*, this court reaffirmed the plain and indisputable doctrine previously asserted: "The pretensions of the husband rest upon the supposition, that he has in law a right to settle and liquidate the community, and that the rights of the wife depend upon such settlement and liquidation, which must be done by and with him alone. If from this he infers that he can sell any of the property, composing the mass of gains of the community, we know not on what law he bases such a pretension. His authority, as head of the community, ceases on the dissolution of the marriage. The right of the heirs of the deceased then attaches," etc. 9 L. R. 584; 1 R. R. 149, 378; 10 R. R. 18; 3 An. 562.

Heirs, we admit, should not be permitted to enrich themselves, at the expense of those whose money has or may have contributed to the payment of debts for which they were partly liable. This, for more than thirty years, has been again and again decided by this court.

In the case of *Calvit et al. vs. Mulhollon et al.*, it said: "Where plaintiffs claim, as heirs of their mother, one half of certain community property sold by the husband after the death of the wife, and the vendee proves that the price of the property was applied to the payment of the debts of the community, he will be entitled to the reimbursement of

the amount so paid for its benefit, in proportion to plaintiffs' interest in the community." 12 R. R. p. 266.

The decision rendered by our predecessors and reported in the twenty-seventh Annual is based, not only on the ground that the husband may sell community property, after the death of his wife, but on the additional ground that, under such a sale, the purchaser has no right to suspend the payment of the price and rescind the contract, unless actually disturbed in his possession or threatened with eviction. In that construction of the law we do not concur. Where there is no title, there ever was, there is, there hangs a perpetual danger of eviction.

When to one's possession, instead of a presumption of ownership, there is linked the confessed certainty that you are not the owner; that, when transferred by him, the transferred title was not in the vendor, but that it was and still is in another, a different person, what, as to such a vendee, is the value of his possession? Under those circumstances, can the mind be bent to the extravagant credulity, that he has no just reason to fear that he shall be disquieted? Would he be so imprudent as to build a home on land held and detained under such a transfer? If he did, he or his children, after him, might well expect to be expelled from that home.

In 1829, this court was called upon to determine a controversy, which, in only one aspect, differs from this one; it had to consider the effects, not of a promise of sale, but of a sale. The facts are thus stated by Mr. Justice Porter: "The property was purchased by the husband during the life of his wife, and made, of course, a part of the community estate. After her death, he sold it as belonging to himself. The plaintiff insists the one half was owned by the minor children, and the sale by their father, without the formalities of law, did not transfer their title."

"We think the buyer has just reason to fear being disquieted, when he has acquired by a defective title, which does not vest in him a legal right to the property purchased, and that when the title is clearly defective, he has nothing to do with the considerations that may or may not induce others to sue him. No man would wish to acquire property, or hold it under such contingencies. It is sufficient for the buyer to claim the protection of the law, that he holds at the will of others. It was urged that the vendor was insolvent at the death of his wife, and that the children could not hereafter claim the land without becoming responsible for their mother's share of the debts. Admitting this to be true, who can tell what value the property may acquire before the time of prescription will run against the children?" 7 N. S. 94, 95.

Defendant's counsel contends that plaintiff has accepted delivery, and should be considered as in possession of the premises. This assertion

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contradicts the contract. Title, delivery, and possession were to be given at the date fixed in the contract, and that was the first of January, 1873.

Plaintiff was allowed to enter the premises before that date and to take only the possession required to make, or cause to be made the repairs which he thought necessary; but he did not move on the place a single article of his furniture, he did not occupy for a day, a moment, any part of the residence. That possession was limited to a specified purpose, and resulted, not from any clause of the contract, but from the consent of defendant. It lasted until the first of January.

The counsel argue that plaintiff has made no tender of the property, and that, without it, the contract can not be rescinded. There no longer remains a contract to rescind; that which existed between the parties expired on the day it was violated, and plaintiff could not have been expected or compelled to return to defendant that which, legally, never was out of defendant's possession.

His counsel invoke a reasonable presumption; they remind us that Mrs. Buckner married and died during the war; that the husband was rich, the wife poor, and that it is difficult to conclude that the price of the property, twelve thousand five hundred dollars, was acquired during the marriage. There is a higher presumption than that invoked by them. In the sale to Buckner, there is no mention that he bought for him alone and with his own funds; he bought during the marriage, and the acquired title passed to the community.

In deference to counsel, we have carefully examined every authority, every proposition on which they have rested a hope and built their expectations. We now return to the parties, to their contract, their mutual obligations, their written promises, and, by the light of their expressed intentions, we will construe and enforce their contract.

It was violated; of this there is no doubt. By whom was it violated? Plaintiff charges that it was by defendant; defendant charges that it was by plaintiff. Who is wrong, and who is right?

In the document by which their agreement is evidenced, we read: "*Said Fuller agrees to sell to said Bennett, and convey by formal title, free from all incumbrances,*" the lot and buildings. That document was not itself the intended sale, the formal title therein referred to; otherwise, how explain that declaration: "*I agree to sell, to convey by formal title?*" Would he have bound himself to do what was already done, to give what he had already given? That can not be; that construction can not be imprisoned in that declaration.

There was to be a sale, the title was to be transferred; that was to be done; the agreement was not self-acting; there was to be another, a second act, to carry the first into execution. The first contract contained

two conditional obligations: one to sell, the other to buy. When was the second act to be passed, the obligation to be executed? On the first of January, 1873.

On that day, Bennett went to Fuller, asked him for the promised title, a title free from all incumbrances; on that day Fuller had but a fraction of that title, and that fraction was subject to a mortgage in favor of Lester, amounting, without the stipulated interest, to more than fifty-six hundred dollars, more than the price fixed by himself for the whole of the property he had bound himself to transfer free from all incumbrances.

The tender of the price by plaintiff was irregular, but useless; the first obligation to be executed was that of defendant. Unless the latter presented such a title as had been agreed upon between them, no price was due, none had to be offered by Bennett. On the seventh of May, 1877, Fuller tendered him, in open court, an act translatif of the property herein referred to, with the written consent of Lester that he would release his mortgage on said property, if the price fixed in the promise of sale, four thousand dollars, were paid in court for his own use and benefit.

It was too late; more than four years had elapsed since the day fixed for the execution of the title, and the land was still mortgaged; but had said mortgage been erased on the first of January, 1873, that fact alone would have been insufficient to bind the plaintiff. Fuller could not then, nor can he now, transfer what he and Bennett know to belong to the minor Buckner.

Fuller offered to give security to protect Bennett against the danger of the apprehended eviction. This Bennett refused. It was his right. Fuller was to be, but was not a vendor, and he could not compel one who had not accepted an intended sale, to accept any security, as a protection against the troubles, the disturbance, the losses invariably entailed by the acceptance of a defective title, or of one which has no existence.

This was not one of the conditions of their contract; and, as no condition of that contract was repugnant to law, it became the law of the parties. Reduced to its true proportions, what was the agreement? I bind myself, said Fuller to Bennett, to give you, on the first of January, a title free from all incumbrances. If you do, answered Bennett, I shall, on the same day, accept your title, and then pay you four thousand dollars.

The promised title was not, could not have been given at the date agreed upon, and the violated promise did not grow into a contract of sale.

From November, 1872, to the first of January, with Fuller's consent, Bennett, relying on the performance of Fuller's obligation, improved

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and repaired the uninhabitable premises which he was to buy. He claims, from defendant, not a cent more than he disbursed, and, as those improvements and repairs remain to Fuller and have enhanced the value of his property, he is undoubtedly liable to Bennett for an amount equal to their cost.

Plaintiff's demand is not only a strictly legal, but also a reasonable demand.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be affirmed with costs.

Mr. Justice Egan recused himself in this case.

No. 726.

SUCCESSION OF H. T. COTTINGHAM. OPPOSITION OF THE WIDOW.

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The preference on the proceeds of his debtor's property, which a creditor has acquired by procuring the cancellation of a fraudulent mortgage on that property, is inferior in rank to the widow's claim under the homestead law.

A PPEAL from the Probate Court, parish of Caldwell. *Barry, J.*

George Wear, for Mrs. Bettie Cottingham, appellee.

S. M. Brian, for Jules Rose & Co., appellants.

The opinion of the court was delivered by

DEBLANC, J. On the tenth of March 1877, the administrator of the succession of Thomas T. Cottingham, filed a provisional account, in which he acknowledges having received, for said succession, the sum of one thousand fifty-two dollars and fifty cents, and having paid or classed to be paid, as privileges, twenty-four claims, amounting, in the aggregate, to \$1703 70.

This account is opposed by the firm of Rose & Co. and by Mrs. Cottingham, the widow of the deceased. That firm have alleged and proved that, by its efforts and vigilance, these fraudulent acts of the said Thos. H. Cottingham have been annulled and revoked, and the property described in said acts subjected, by a decree of this court, to the payment of their claim against the succession of their deceased debtor. They now claim, by preference, the proceeds of the sale of the property which was effected by a conventional mortgage revoked at their suit.

The widow complained in the lower court that, though under the provisions of the Code, her claim under the homestead law, should be paid in preference to all other debts, except those specially mentioned in the law, the administrator had classed it as the last privilege to be paid.

The opposition of the widow was sustained, that of Rose & Co. dismissed. From the judgment of the lower court, the latter alone have appealed. They alone still urge their opposition to the administrator's account, and, from the oral and printed argument of their counsel, that opposition is now limited to the preference allowed to the widow's claim.

The creditor has an action to annul any contract made in fraud of his rights. In that action, what should be the judgment of the court? That all the property or money fraudulently *taken from the debtor's estate*, be applied to the payment of the claim of the successful creditor.

The words "*taken from the debtor's estate*," indicate that the lawgiver had reference to a case where there has been, apparently at least, a change in the possession of the property, and when, by the creditor's diligence, by the exercise of his action, the asserted contract is partly or absolutely canceled. R. C. C. 1970, 1977.

By that action, a mortgage, as well as a sale, may be avoided; but a mortgage does not divest the title, does not change the possession, and though its cancellation entitles the suing creditor to a preference on the proceeds of the property described in the avoided contract, that preference does not, can not exclude any of the rights which, even if the mortgage had not been annulled, would have outranked the claim secured by that mortgage. The revocation of a mortgage gives to the creditor, at whose instance it was revoked, a preference over all the other creditors, with whom, otherwise, he would have been on a footing of equality. It converts into a superior right, that which, before the revocation and without it, was and would have remained a concurrent right. It gives, it creates a priority, but does not supersede or destroy an already existing priority.

It has been invariably held, by this court, that the privilege conferred on the widow and children in necessitous circumstances is superior to all other privileges, except that of the vendor and those incurred in selling the property.

Our Code has been revised, and, of the law which confers that extraordinary privilege, not a syllable has been changed.

When the succession amounts to one thousand dollars, the widow may take, less a fraction, the whole of the succession. R. C. C. 3252; 26 An. 166; 27 An. 560.

The fraudulent mortgage did not, could not, affect the priority of the widow's claim, and the success of the creditor's action against it, did not add to her right, did not regain, for her, an advantage which, otherwise, she might have lost. The rank and extent of her claim are fixed by law, and no mortgage, real or simulated, except the vendor's, could or can change the rank, or reduce the amount of that claim.

Succession of Cottingham.

In this case, and so far as concerns the revocation of the mortgage, the creditor's diligence can not be rewarded.

The law is clear, imperative, and, as our predecessors, we must apply the law as we find it written. The widow's claim surpasses, in legal dignity, not only conventional mortgages, but even the privilege securing the payment of the expenses of the last illness and of the funeral charges. When, as in this instance, she takes the whole of the succession, she must, out of the bounty allowed her, pay these expenses and charges. This, on her part, is more than a duty, it is an obligation.

By whom, generally, are such debts contracted? Is it exclusively, by one chained to his bed by a mortal disease? Is it by one whose lips are sealed and voiceless? Is it by the future, the unnamed administrator? Who sends for the physician? Who orders the coffin? For those debts, by whomsoever they may be contracted, the wife and the children are liable. Otherwise, many a parent and husband would die for want of proper assistance, and a few might have to be buried without a coffin.

In this case, it would be a strange injustice to compel the administrator, who has paid some debts contracted by the wife, or for which she alone is liable, to deliver to that wife the entire succession of the husband, without deducting therefrom what he has paid for her.

When the husband is alive and has no property, no means, the wife is bound to provide for the household expenses; when he departs this life, and she takes all that he leaves, she is, morally and legally, bound to pay for the last services rendered by their physician, the clothes in which he was buried, his coffin and his grave.

There is no error in the decree of the lower court, and that decree is hereby affirmed; the costs of the appeal to be paid by Rose & Co.

MARR, J. I content myself now with simply concurring in the decree of the court, reserving the right to assign my reasons separately hereafter, if I think proper to do so.

DISSENTING OPINION.

MANNING, C. J. I cannot assent to the doctrine that the widow's portion under the act of 1852 ranks the burial expenses, and those for settling the succession, nor am I aware that it has been thus invariably held by this court.

The question was first presented in Foulkes' succession, 12 Annual, 537. when the court held the contrary doctrine. The language then used was—"our construction of this law is, that the destitute widow's portion primes all privileges created previous to the death of the party and sub-

sequently to the passage of the act of 1852, except that of a vendor, but that it yields to funeral expenses, the expenses of last illness, and law charges growing out of the administration and settlement of the succession." A dissenting opinion was read in that case in which it was argued that by the terms of the act of 1852, the widow's portion must rank everything but the vendor's privilege and the expenses of selling the property, but it was an argument against the decision of the court.

In Bouvet's case 25 Annual, 431. the point before the court was, whether the widow's portion should prevail against the lessor's privilege, and in Cooley's case, 26 Annual, 166. it was whether the minor's portion under same act of 1852 primed that of the vendor of movables, and these decisions are authority on those points alone. All else is *obiter dicta*. In Rawls' case, 27 Annual, 560. it does not appear, nor can it be reasonably inferred from the language of the court, that the contest there was between the widow for her portion, and the funeral expenses and necessary law charges, but the doctrine is announced, and much too broadly, that the portion of the widow under the act of 1852 is superior to all other privileges, except those of the vendor and those to secure the payment of expenses in selling the property.

So far then from this court uniformly holding this doctrine, the Reports shew that it has never been held until the last published volume, if we may indeed so interpret that decision. I prefer to follow the dictum in the 14th Annual.

So far as I can perceive from the reports of the decisions, the question of rank between the widow and the succession privileges, necessarily created after the death of the decedent, has never been broadly presented since the Foulkes case until now. This case presents it squarely. The assets of the succession are one thousand and fifty-two dollars. The widow claims nearly all of it. The administrator had the dead man buried, paid for his grave, for decent apparel in which to bury him, paid the court charges and law expenses, confessedly necessary to properly and legally settle the succession, and presented his account with proper vouchers. He is entitled to the credits which he claims for payment of these items. Frequent decision of this question, contrary to so equitable a judgment as that, and a long and unquestioned construction of the statute in accordance with it, in cases where the question was directly involved, might induce me to adopt such construction, in deference to the principle *stare decisis*, which all courts recognize as a salutary rule. But I do not discover that the point was ever presented except in the Foulkes case and in the present, and I think the decision here should follow the decision in that case. And I prefer to rest the judgment upon that ground, rather than upon the one adopted by my brethren.

J. D. WILSON VS. CITY OF SHREVEPORT.

The officers of a municipal corporation can not create obligations binding on the corporation, unless their power to do so is express; or necessarily, or rationally implied by the powers that are expressly granted to them in the charter of the corporation, or is essential to the objects for which the corporation was created. The power granted by the charter of a corporation to give such bonds as might be necessary in the conduct of its litigation, or in the current administration of its affairs, does not authorize the issue of bonds for raising money.

A negotiable form will not impart validity, even in the hands of a *bona fide* holder for value, of an obligation of a corporation which it had not power to contract. The officers of a municipal corporation can create no debt against the corporation, unless the ordinance creating the debt imposes a tax for its extinguishment.

A PPEAL from the Tenth Judicial District Court, parish of Caddo.
Looney, J.

Land & Taylor, for plaintiff and appellee.

T. Alexander, City Attorney, for defendant.

The opinion of the court was delivered by

MARR, J. Plaintiff seeks to recover of the city of Shreveport thirty-five hundred dollars, on seven bonds for five hundred dollars each, dated the first of September, 1866. He alleges that these bonds were issued to R. D. Sale, in part payment for stock in the Shreveport Gas-Light Company purchased by the city; and that he acquired them of Sale, in good faith, for a valuable consideration, before maturity.

The city answers that these bonds were issued without authority, and that, having been issued illegally, they are absolutely null and void.

There was judgment in favor of plaintiff for the amount sued for, with interest from the first of September, 1876. The city appealed; and plaintiff, in answer to the appeal, prays that the judgment be so amended as to order the amount to be paid by preference out of the revenues derived from taxation, according to the tenor of the bonds and as prayed for in his petition.

By ordinance of the third of July, 1866, the city government provided for the issue of one hundred and fifty thousand dollars in bonds, to be of five hundred dollars each, one hundred redeemable in five years, one hundred in ten years, and one hundred in fifteen years, bearing interest at eight per cent, payable annually, to be transferable by indorsement; none of said bonds to be sold for less than ninety cents on the dollar.

The second section provided for the extinguishment of these bonds, by setting apart ten thousand dollars each year, of the revenues derived from the wharf, to constitute a sinking fund.

On the ninth of July this ordinance was so amended as to set aside ten thousand dollars annually, from the annual taxes of the city, in lieu of the same amount set aside from the wharfage fund.

On the eleventh of August an ordinance was passed providing that thirteen thousand dollars of the city bonds, one half or more to run for five years and the balance to run for ten years, be appropriated, together with \$825 in city change, for the purchase of \$12,500 of stock in the Shreveport Gas-Light Company, the bonds to be paid out at ninety cents on the dollar, the change notes at par; and a committee was appointed to make the purchase.

By a memorandum furnished by a clerk of the administrator of accounts it appears that thirteen of these bonds, Nos. 68 to 80 inclusive, having ten years to run, were issued on the first of September, 1866, to R. D. Sale, secretary of the Shreveport Gas-Light Company, of which Nos. 75, 76, 77, 78, and 80 were retired, when or how it is not shown, leaving "afloat," in the language of the memorandum, Nos. 68 to 74 inclusive and No. 79. The seven held by plaintiff, and sued on, are Nos. 68 to 74 inclusive.

The only testimonial proof is that of Leonard, who was city controller on the first of September, 1866; and he says these bonds were a part of a series issued by the city in payment of stock purchased in the Gas-Light Company.

The bond copied in the transcript, which differs from the others only in the number, certifies that the mayor and trustees are indebted to R. D. Sale or bearer in the sum of five hundred dollars, payable at the controller's office, which sum the mayor and trustees promise to pay to Sale or bearer, "ten years from the date of this bond;" and also to pay interest annually from date, at eight per cent. "For faithful payment of this bond the city has pledged all the revenues derived from the taxation of real estate and personal property within the city." Dated the first of September, 1866, signed by the mayor and controller, and countersigned by the committee on finance.

The only question to be solved is as to the validity of these bonds as obligations of the city of Shreveport; whether the municipal government had legal power and authority to bind the corporation by these instruments.

Dillon on Municipal Corporations, chapter v., p. 173, sec. 55, says: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in *express words*; second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation—not simply convenient, but indispensable."

This is so manifestly true that we shall not cite authorities in support of it; and it is much to be regretted that so many of those charged with the administration of municipal corporations, and some judicial tribunals,

sitting in judgment upon their acts, have not acknowledged and recognized this doctrine to its full extent, and have not observed and enforced it inflexibly and unqualifiedly. It remains for us to review the several acts of the Legislature incorporating the town of Shreveport and amending the charter, in order to ascertain whether these bonds were issued in the lawful exercise of power and authority conferred upon the corporation by the Legislature.

The original charter of the town of Shreveport was by act of 1839, page 200. The word "bond" does not occur in this act, but section four made it the duty of the mayor "to sign all *notes or other obligations* binding the corporation."

The power of direct taxation was limited, by section six, to one thousand dollars in any one year; and the trustees were also empowered to levy and collect, by just and equitable apportionment, a tax on certain personal property and callings and pursuits.

The charter was amended by act of 1850, page 123; and by one of the clauses of section one the mayor and trustees were authorized to "give bonds and receive bonds, which shall be as effectual in law as other bonds given under the laws of this State."

This clause was repeated in the act of 1853, which simply amended and re-enacted section one of the act of 1850, by omitting the limitation of direct taxation to two thousand dollars, fixed by the act of 1850.

Section four of the act of 1850 repealed that clause of section four of the act of 1839 which made it the duty of the mayor "to sign all *notes or other obligations* binding the corporation." Subsequent acts make no mention of *bonds or notes or other obligations*. The act of 1854, page 165, relates to the establishment of work-houses; that of 1857, page 216, authorizes the imposition of fines and the levy of taxes on certain property and pursuits; that of 1859, page 120, relates to the officers of the corporation, the manner of collecting taxes, the levying of taxes for paving or macadamizing the streets, the establishment of hospitals, pest-houses, cemeteries, etc.; the two acts of 1860, one, at page fifty-nine, authorizing the mayor and trustees to sue and be sued as "the city of Shreveport," the other, page 106 *et seq.*, relating to the collection of municipal taxes; and the two acts of 1866, one, at page eighty, like that of 1852, page seven, relating to the establishment of ferries across the Red river, and the other, page 276, authorizing the mayor and trustees to purchase and hold, in fee simple, real estate outside the corporation for the use and benefit of the town.

The power to issue bonds, for the purpose of raising money, was not granted to the municipal government prior to the new act of incorporation in 1871, unless such power is deducible from section four of the acts of 1839 and 1850, respectively, or from section one of the acts of 1850

and 1853, respectively; the former making it the duty of the mayor to sign all *notes or other obligations* binding the corporation; the latter authorizing the mayor and trustees to *give* bonds and to *receive* bonds.

The duty imposed on the mayor to sign all *notes or other obligations* binding the corporation is in the section which is devoted to the powers and duties of the mayor. If, under the powers granted, *notes or other obligations* can be given binding the corporation, such *notes or obligations* must be signed by the mayor, the executive of the municipal government; but the section does not undertake to say what *notes or other obligations* the mayor may lawfully sign. The corporation is not bound by any unless they are signed by him.

The acts of incorporation, 1839, 1850, authorize the mayor and trustees to sue and be sued "in any and all manner of causes and actions: to acquire, hold, farm, lease, or convey any property, real or personal," and to compromise, arbitrate, or transact in regard thereto, and to erect public works and buildings. In some causes or actions appeals might be necessary, for the enforcement or the protection of the rights of the corporation; in other cases conservatory process might be necessary, such as writs of arrest, attachment, provisional seizure, sequestration, injunction. In all such cases bonds must be given by the appellant, and by the party asking for such writ or process; and it was only by the new charter, act of 1871, p. 227, that the city of Shreveport was dispensed with giving bond or security in judicial proceedings where, by law, such bond is required of litigants. The mayor and trustees might find it necessary to let property, to obtain the use of buildings necessary for municipal purposes on lease, to acquire or to convey real or personal property, to arbitrate, or to compromise. It might be necessary, in the administration of municipal affairs, to make contracts for the several public purposes contemplated and provided for in the charter, and pertaining to the police power, work on the streets, wharf, public buildings, etc. In such cases contracts reduced to writing, signed by the parties, are usual and proper, binding the contractor to perform faithfully his engagements, and obligating the corporation to pay him as stipulated.

The act of 1839, section ten, required the treasurer and collector to give security for the faithful performance of their respective duties; but it failed to prescribe the form in which such security should be given.

It was eminently proper, therefore, that the mayor and trustees should be specially authorized to give such bonds as might be required of them as litigants, or as parties to a compromise or arbitration; and that it should be made the duty of the mayor to sign such bonds; and also to sign such notes as it might be necessary to give for the rent of buildings, or offices for municipal purposes, and such other obligations as might be requisite to the proper execution of the several powers enume-

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rated; and that they should be empowered to take and receive such bonds with security as would guarantee the fidelity of the custodians of the funds of the corporation.

The limitation on the power of taxation excludes the idea of any intention on the part of the Legislature to confer upon the mayor and trustees authority to issue notes, or bonds, or other obligations to be put upon the market to raise money; and the whole context shows that the bonds and notes, and other obligations referred to, meant such engagements only as were within the means and resources of the corporation, as provided by the charter, necessary in the ordinary course of administration of municipal affairs.

As early as 1855 the Legislature, by a general law, No. 263, p. 325, imposed a wholesome restriction upon the extravagance of municipal corporations by enacting, section four, p. 326: "That the police juries of the several parishes, and the constituted authorities of incorporated towns and cities in this State, shall not hereafter have power to contract any debt or pecuniary liability, without fully providing, in the ordinance creating the debt, the means of paying the principal and interest of the debt so contracted."

This law continued in force, and was re-enacted, *ipsissimis verbis*, in the Revised Statutes of 1870, sections 2448, 2786. What an immensity of extravagance, corruption, wastefulness, unnecessary and grievously burdensome taxation, bankruptcy, moral and financial ruin might have been spared to the people of Louisiana if this wise law had been observed and enforced!

Corporations, like individuals, may imagine they require many things, which really can well be dispensed with, or the enjoyment of which may be deferred until they have the means to gratify their tastes and their wishes. The one and the other must learn to live within their means and resources; and those who fail to observe this rule of common sense and common honesty disappoint no one when they become hopeless bankrupts.

It might have been convenient for the town of Shreveport to own stock in the Gas Light Company; but the lighting of the streets did not make it necessary for the corporation to become a stockholder in that company. The acts of incorporation enable the corporation to acquire property; but there is no occasion for the contracting of a debt in order to exercise this right. With money in hand, property may be acquired on advantageous terms; those who have not the money, should wait until they have it, or use their credit only when the means of meeting the debt at maturity are provided and are certain. The Legislature meant to compel the observance of this much of honesty by municipal corporations, by prohibiting the contracting of debts by them without

fully providing for the payment of principal and interest in the ordinance by which the debt is created. We shall enforce that law, whenever it is in our power, and occasion may require.

Those who contract with municipal corporations, know that these bodies act validly only within the powers conferred upon them by the special laws by which they are created; and the creditor of a corporation is bound to see that the contract or obligation, of which he claims the benefit, is within the power which the corporation may lawfully exercise. The fact that the obligation is in the shape of a negotiable instrument, or that it was acquired in good faith, for a valuable consideration, before maturity, in no manner enlarges the power of the corporation, or gives any additional force or validity to its unauthorized acts. It may be added, however, that plaintiff purchased these bonds, at fifty cents on the dollar, at sheriff's sale, under execution, on a judgment against his debtors, who, as he alleges, pledged them to him as security.

The ordinance under which these bonds were issued made no such provision for the payment of the principal and interest as the law imperatively requires. The second section of the ordinance set apart ten thousand dollars a year from the revenues derived from the wharf as a sinking fund; but the mayor and trustees, within a week after its passage, repealed this section of the ordinance; and, without levying any new or additional tax, set aside ten thousand dollars out of the taxes of each year as a sinking fund. The bonds were for one hundred and fifty thousand dollars, on which the interest, at eight per cent, would be twelve thousand dollars; so that it would have required twenty-two thousand dollars to pay the interest and to provide for the retirement or redemption of ten thousand dollars of the bonds the first year. Upon the hypotheses that ten thousand dollars would be provided for each year, the amount required for the first year, twenty-two thousand dollars, would have been diminished by eight hundred dollars only each year. The statement in the bonds that the city, "for the faithful payment has pledged all the revenues derived from the taxation of real estate and personal property," is not more obligatory than the promise to pay; and it could be disregarded with equal facility and impunity. What the law means by "providing fully in the ordinance for the payment of principal and interest," it has taken care to explain in very simple terms. The succeeding section, five, of the act of 1855, says: "The ordinance or enactment providing for the payment of the principal and interest of any debt created by any board of police, or authorities of incorporated towns and cities, shall remain in full force until the debt and interest is paid."

These two consecutive sections of the act of 1855 are re-enacted in the same order in the Revised Statutes, sections 2448, 2449, 2786, 2787. The

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succeeding section, six, in the act of 1855, likewise re-enacted in corresponding order in the Revised Statutes, shows that the Legislature intended that a tax, sufficient to pay the debt and interest in full, should be imposed by the ordinance which created the debt; and it empowered the proper judge, at the instance of the creditor, to enforce payment by compelling the corporate authorities to collect the special tax, just as other taxes were collected. It was under the dominion of this law that these bonds were issued; and by this law they must be tested.

The bonds sued on were issued without legal warrant or authority; they were issued in contempt and in flagrant violation of sections four and five, No. 263 of the act of 1855, a prohibitory law; they are not obligations which can be enforced in a judicial tribunal, they are absolute nullities.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there be judgment in favor of the city of Shreveport, appellant, defendant, against J. D. Wilson, appellee, plaintiff, rejecting his demand, and dismissing his petition, with costs in both courts.

Mr. Justice Egan having been of counsel, takes no part in this decision.

No. 745.

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G. W. SENTELL & Co, IN LIQUIDATION, vs. MRS. M. G. KENNEDY AND HUSBAND.

Where a principal has dealt with a merchant through an agent acting under a written power of attorney, the merchant may prove by parol the correctness of his account, and any acknowledgment of its correctness, or any ratification of it by the principal, even if the agent has transgressed his mandate, or there are charges in the account which could not be legally enforced.

Where a factor's account is closed, stated, and rendered, at the end of the commercial year, and not objected to by his client, showing a balance in his favor composed of principal and *accrued interest*, on such balance interest may be charged in any subsequent accounts between the parties. Interest on such a balance is not compound interest.

Ratification by the principal of the unauthorized acts of an agent makes those acts binding on the principal.

A power of attorney sufficiently comprehensive to authorize the agent to manage a plantation, and disburse the proceeds of its crops, will justify the factor who sells the crops to pay out their proceeds on the orders of the agent.

A PPEAL from the Eighteenth Judicial District Court, parish of Bossier. *Turner, J.*

J. A. Snider, for plaintiffs and appellees.

J. D. Watkins and *J. A. W. Lowry*, for defendants.

The opinion of the court was delivered by

MARR, J. G. W. Sentell & Co. were factors and commission merchants,

of New Orleans, and Mrs. Mattie Gilmer, now wife of P. J. Kennedy, lately widow of P. V. O'Neill, owned certain plantations in Bossier parish, where she resided.

O'Neill died in the fall of 1870; and his widow was the administratrix of his succession. On the first of December, 1870, she executed a writing, recorded in the office of the parish recorder of Bossier on the nineteenth of December, 1870, by which she appointed Samuel W. Vance, of the same parish, her agent, with large powers, to be exercised, in her absence as well as when she was present, with respect to her personal rights and property, as well as in reference to the succession of her deceased husband, "in the management of plantations and estate."

Under this power, Vance managed the entire business of his constituent up to the sixteenth of May, 1874. He shipped her crops to G. W. Sentell & Co., and through them he controlled and disposed of the proceeds, purchased supplies for plantation and family use, and made all the outlays and disbursements.

The account was kept by Sentell & Co. in the name of "Mrs. M. G. O'Neill," and it begins on the twenty-fifth of January, 1871. Detailed accounts were rendered on the first of June, 1871; twelfth of April, 1872; twenty-fourth of June, 1873; sixteenth of May, 1874; tenth of May, 1875, and twenty-first of February, 1876. The last account is in the name of "Mrs. M. G. Kennedy," and it closes with a balance against her of \$3497 22, for which this suit was brought in September, 1876.

The debit side of these accounts consists of invoices of merchandise, supplies purchased, freights paid on them, cash advanced, numerous drafts, most of them at sight, commissions for advancing, and for accepting where time-drafts were drawn, and interest at eight per cent. The credit side consists of proceeds of sales of cotton, except certain items of cash, which will be more specially mentioned hereafter; and interest allowed at the same rate. Each of these accounts, except the first, shows a balance due by Mrs. O'Neill, and each balance is the first item, to the debit, in the succeeding account.

All the drafts were signed "Mrs. M. G. O'Neill, per S. W. Vance, agent," except one, signed by Mrs. O'Neill herself, in favor of Vance, of date seventh of April, 1871, for \$698 47. One of the drafts was in favor of Head, tax-collector, dated fifteenth of July, 1873, for \$959 71, for State and parish taxes due by Mrs. O'Neill, for 1872. The others are in favor of divers persons, for different amounts, with no indication of the purposes for which they were drawn.

The answer of defendant, assisted by her husband, was filed on the twenty-first of March, 1877; and the plea of prescription was filed on the same day. The former begins with a general denial; and this is followed by a special denial of the authority of Vance, "as agent, to sign notes,

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or bills, or drafts, to bind *defendant*." She alleges that "her plantations made, and plaintiffs received annually from them, cotton worth largely more than the expenses;" that "the charge of interest, compounded, in said account is usurious and unlawful, and the same of the commissions charged;" and she shows that "the item of June 1, 1871, \$8590 43, which plaintiffs charged to M. G. Gilmer, and placed to the credit of S. W. Vance, is unlawful and unauthorized, and other items, also."

The testimony in behalf of plaintiffs was taken before the answer was filed, except that of J. A. Snider, a member of the bar, which was given on the trial. The trial commenced on the same day that the answer was filed; and the judgment was in favor of plaintiffs for \$4567 20, with five per cent interest from the sixteenth of May, 1874; and the additional sum of one hundred dollars, with like interest, from the twentieth of October, 1874, until paid, subject to a credit of \$2559 40, of date twenty-fourth of February, 1875.

This judgment was arrived at by taking the balance, \$4838 63, shown by the account ending sixteenth of May, 1874, when Vance's agency terminated, and adding invoice of twenty-sixth of July, 1873, with interest to the sixteenth of May, 1874, say \$441 47, aggregating \$5280 20. From this aggregate the commissions charged for advancing up to the sixteenth of May, 1874, \$712 90, are deducted; and the additional sum, one hundred dollars, is for money paid to defendant in person by Sentell & Co. The credit is for proceeds of cotton, forty bales, shipped by defendant to Sentell & Co. after Vance's agency had ceased, sold twenty-fourth of February, 1875.

Defendant appealed; and plaintiffs, in their answer, pray that the judgment be so amended as to allow the \$712 90 for commissions, rejected by the court below; and interest at eight per cent from the sixteenth of May, 1874, instead of five per cent, as allowed.

Before proceeding to other matters, we shall consider certain items in the accounts rendered, which are not explained by the testimony, and which should and probably would have been explained, but for reasons which dispensed with such proof, as we shall see in the sequel.

In the account beginning twenty-fifth of January, ending first of June, 1871, there are but three items to the credit of defendant, one twenty-fifth of January, 1871, "by cash received, B. M. Johnson's check, \$8912 60;" one February 6, "by cash received, Watt & Troy's check, \$3492 39;" and one first of June, "by interest balance to your credit, \$288 10." The last item to the debit of this account, which balances and closes it, is on the first of June, "to Dr. S. W. Vance, amount to your credit, placed to his account by his order, \$8590 43."

In the account beginning ninth of June, 1871, brought down to twelfth of April, 1872, on the credit side is this entry, under date eleventh of

April, "by cash received of S. W. Vance, Sandidge & Co.'s check, \$3689 56;" and in the account beginning twelfth of April, 1872, brought down to twenty-fourth of June, 1873, is this entry to credit, under date twenty-sixth May, 1873, "by Dr. S. W. Vance, this amount charged to him, and placed to your credit by his order, \$6811 66." These two credits amount to the sum of \$10,501 22; and interest is allowed on them from the eleventh of April, 1872, and twenty-sixth of May, 1873, respectively. The \$8590 43, transferred to Vance's account on the first of June, 1871, with interest for two years at eight per cent, would amount to \$9964 90, less, by \$536 32, than the aggregate of the two sums placed to the credit of defendant by Vance, on the eleventh of April, 1872, and twenty-sixth of May, 1873.

The law does not require judges, in the absence of proof, to impute fraud or crime; and it is much more in accordance with the intimate relations existing between Dr. Vance and Mrs. O'Neill, to assume that he did not abuse his fiduciary powers, and betray her confidence by appropriating her money to his uses, without her consent, wrongfully; and that the sums placed by him to her credit left her no cause of complaint on that score.

Among the numerous letters written by Vance to Sentell & Co., filed in evidence, all of which are in the most friendly terms, and show great intimacy between the parties, is one of the tenth of March, 1871, in which Vance says: "Mrs. O'Neill wishes to buy half-interest in store, which I may sell to her." In the account beginning twelfth of April, 1872, under date seventeenth April, more than a year after this letter of the tenth of March, 1871, this entry appears to the debit: "To S. W. Vance & Co., one half their debit to us, \$2600 20;" and again, under date twenty-seventh of May, 1873, this entry appears to the debit: "To S. W. Vance & Co., your one half of their indebtedness, incurred since April 16, 1872, \$4206 71."

It is not difficult, certainly it is more satisfactory, more in harmony with the unquestioned facts established in this case, to assume, in the absence of proof to the contrary, that neither Sentell & Co. nor Vance intended or attempted to make Mrs. O'Neill, toward whom they both occupied fiduciary relations, pay one half of the debts of S. W. Vance & Co. without corresponding liability on her part; that it was true, as Vance wrote Sentell & Co. on the tenth of March, 1871, at a time not suspicious, casually, in the freedom of friendly correspondence, that Mrs. O'Neill wished to buy a half-interest in Vance's store; that Vance afterward acceded to her wish, as he said in his letter to Sentell & Co. he might do; that she actually did buy that interest; and that the sums just mentioned were properly charged to her for her share, one half of the indebtedness of the "store," from the date of the purchase.

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We know that on plantations where large numbers of laborers are employed, the proprietors find it to their interest to establish "stores," so that the laborers will not be compelled to resort to the neighboring villages for such things as they may need from time to time; and the proprietors will not be annoyed by having strangers enforcing liens on the portions of the crops belonging to the laborers; and it was quite natural that Mrs. O'Neill, necessarily employing a large number of laborers, in the cultivation of her plantations, should desire to share, equally with her agent, in the benefits and convenience of such an establishment.

In this connection, it is proper to state, that Sentell proves that, in 1861, Dr. Vance was the agent of defendant. He says, speaking of Mrs. O'Neill: "I have know her very well for twenty-four or twenty-five years. In 1861 I was a member of the firm of Sentell & Prother, who did business with defendant, through her agent, Dr. Vance, under the same terms and rates as to interest and commissions as mentioned in the account now sued on." So that the relations between these parties were of long standing, and they must have been quite satisfactory, or they would not have been renewed in 1870, immediately after the death of defendant's husband, O'Neill.

Plaintiffs took the testimony of G. W. Sentell and of McLean, the book-keeper and cashier of G. W. Sentell & Co. They both prove the correctness of the accounts; and they annex to their depositions a large number of drafts and invoices as vouchers; and many letters written to Sentell & Co. by Vance, as agent for Mrs. O'Neill, and in reference to her business.

Defendant objected to this testimony, and to that of Vance and Zeigler, his clerk, and of J. A. Snider, a member of the bar, all the witnesses in behalf of plaintiffs, on grounds which are embodied in one bill of exceptions, which we copy, because it is easier than to condense it; and because it presents the entire defense to the demand:

"Defendants objected before the clerk (who took the depositions of Vance and Zeigler), and before crossing the interrogatories to Sentell and McLean, and objected at the trial to the introduction of the evidence of all said witnesses, and that of J. A. Snider, as also being parol and testimonial evidence, which could not be received to prove the mandate or power of attorney given by M. G. Gilmer to S. W. Vance, as the same was in writing, and the writing was the best evidence, which could not be contradicted, varied, or extended by parol. C. C. 2256.

"They objected to the plaintiffs' offer to introduce or to taking of said evidence, because plaintiffs sought, in the claims sued on, to force defendant to pay a large amount of usurious interest and compound interest; interest on interest, and commissions for use of money, which could not be proved by parol. But in law, no promise to pay any interest

beyond five per cent simple interest could be proved by any other evidence than written evidence, signed by the defendant.

"They further objected that where it took such evidence to bind defendant, no agency could be proved to bind her, except written evidence of the agency.

"That the drafts, and bills, and orders purporting to be signed by S. W. Vance, as agent, were without authority, were his debts; and no assumption of defendant to pay same could be proved by parol or other than written evidence, signed by defendant. Which objections were overruled by the court, and the evidence received, to show acknowledgments, both verbal and in writing, of acts by agent, and to show payments made by such agent, the correctness of which payments was recognized by the defendant, by writing, and to show, generally, the correctness of the acts of the agent."

First—The first part of this bill of exceptions is based upon a misapprehension of fact. The plaintiffs offered the written power of attorney; and they made no attempt to prove it otherwise than by this writing. The testimonial proof was offered to show what the agent did. The acts of an agent may be proved by any sort of testimony by which such acts can be established; and when they are proven, reference must be had to the written power itself, in order to determine, as a matter of law, whether these acts fall within its scope and design. The distinction between proof to establish a written power, and proof to show what the agent did in execution of that power, is too obvious to require discussion. The written power must be proven by the writing itself; the acts of the agent may be shown by any evidence by which the same acts, done by any individual, could be proven.

Second—The next objection is also founded on a misapprehension. The testimony was not offered to prove any agreement by defendant to pay compound interest, or usurious interest. The object was to prove the correctness of the account; and, certainly, the correctness of an account may be proven by showing that the items of which it is composed, debit and credit, are in accordance with the actual dealings between the parties. The fact that accounts were rendered frequently, during the course of the dealing, and that no objection was made by the debtor; that these accounts were running for several years, and were acknowledged to be correct by the debtor, and by his agent; that payments were made; would tend to prove that they were correctly stated. Parol evidence is admissible to prove such facts, to prove an account; and the fact that there are charges in the account which the debtor could not be legally compelled to pay, is no obstacle to proof that he acknowledged it to be correct, and promised to pay it, and did make payments at different times. The effect of such proofs, so far as any illegal charges in

the account are concerned, is one thing; the proof of the facts is another, and a wholly different thing.

Third—It is the uniform custom of the commission merchants of New Orleans, and every planter in Louisiana knows it, to charge and allow interest at eight per cent; to charge two and a half per cent commission for selling cotton; the same for buying supplies ordered; the same for advancing; and the same for accepting time-drafts. When the crop is sold, an account is rendered; and if any balance remains, due the merchant, if it is not paid, it is carried into the next account, treated as due at the date of the last account; and interest is charged on it from that date. This balance is made up of the principal, interest, and commissions, less proceeds of sales, and interest allowed; and this has been held to be no violation of article 1934 of the Civil Code, 1939 of the Revised Civil Code; Mylne's case, 4 An.; Compton's case, 5 An. Indeed, the text of this article of the Code is too plain to leave any doubt as to its meaning:

“Interest upon interest can not be recovered unless it be added to the principal, and, by another contract, made a new debt. No stipulation to that effect in the original contract is valid.”

An agreement by the original contract, to pay interest upon interest is not valid. Interest upon interest may be recovered, where the interest, after it has become exigible, is capitalized, added to the principal, and by another contract made a new debt. And this is precisely what the merchants in New Orleans do, and what they have been doing, invariably, for years; and the planter, who accepts the accounts without objection, and continues to do business with the merchant from year to year assents to this, and binds himself as effectually as he could do by express promise, or verbal acknowledgment.

In point of fact, where the credits in the accounts suffice to pay the interest, this mode of keeping accounts can not be called the compounding of interest; because, so much of the aggregate debit as is composed of the interest, is paid by deducting the aggregate credit, composed in part of interest allowed, and is extinguished. The result is the same to the debtor, whether his credits are first applied to the payment of the interest which he owes, and the balance of the credit is applied to the remainder of the debit; because, no matter how the deduction is made, the balance which remains and is carried into the next account, will be precisely the same.

In the accounts of Mrs. O'Neill, the credits were largely in excess of the interest and commissions charged; and the objection based upon the hypothesis that interest was compounded, is not well founded in fact. But, as we have already said, the entire objection goes to the effect of the testimony, and not to its admissibility.

Fourth—The power of attorney authorized Vance for and in the name and stead of his constituent, “to demand, sue for, and collect, and receive all sums of money, of whatsoever nature, in all business transactions of my own and as administratrix of the estate of my late husband, P. V. O'Neill, and more especially the policy of life-insurance, to collect and receipt for same in my name and stead, and other demands of every kind, nature, and description, which are due and owing, or may be payable to me for my own account, or as acting for the interest of other parties or successions, to give good and sufficient receipts, acquittances, and discharges therefor; and to do each and every act for me and in my name and stead, during my absence from said parish and State heretofore named, or in my presence, that I could do if present and acting for myself, specially empowering my said attorney in fact to act for me as fully as I could in the management of plantations and estate, and all other business of whatsoever nature in any parish or State where my interest may exist or be.”

It can not be questioned that this power was ample to enable Vance to employ overseers and laborers, and to pay their wages; to purchase necessary supplies; to ship the crops, and to control and receive the proceeds. The plantations were in Bossier, where Vance and Mrs. O'Neill lived. To obtain supplies, purchases must be made; and they were made, and Mrs. O'Neill knew they were made in New Orleans, and that they were made through plaintiffs, because the invoices, with the goods, for the plantation on which she lived, and for the use of her family, were sent to her. She knew that Vance could not afford to go to New Orleans to make the purchases in person, which were required from time to time, during the several years of his agency; and she must, therefore, have known that when such things were wanted, Vance would order them, for she did not order them; and that he could not do this otherwise than in writing. The receipt by her, and the use by her, of each invoice of goods ordered by Vance, was a ratification of his act in ordering them, which she has no power to recall.

Defendant knew that Sentell & Co. were her commission merchants, and that she had an account and funds with them; because, on the seventh of April, 1871, four months after the giving of the power, she drew on them, at sight, to the order of Vance. She must have known that Vance paid her taxes, and the expenses of her plantations, since she did not pay them herself; and, as the crops were shipped to Sentell & Co., money must be obtained from them to meet all the expenses of the plantations and of the family; and she expected Vance to get it, and to disburse it for her account. She must have known that the only practicable way of doing this, was by drawing on Sentell & Co. for the sums required, as they were required. These drafts were not intended to

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bind her, they did not have the effect of binding her, as the maker of commercial paper, to circulate or to be discounted. There can be no doubt of the authority of Vance to have demanded and to have received, and to have given "good and sufficient receipts, acquittances, and discharges," for the entire proceeds of sales of her cotton, or any other funds of hers, in the possession of Sentell & Co. The drafts, bills, and orders were simply vouchers to Sentell & Co. to show what disposition they had made of defendant's money and property in their hands; and as Vance, if he had been in New Orleans, might have directed Sentell & Co. verbally, to pay the money in their hands to such persons as he might name, there can be no good reason why he might not, being in Bossier parish, give the same direction in writing. Of course, in either case, if he abused his power, and made an improper disposition of his constituent's money, he would be answerable to her.

The testimony was not offered to show any assumption, by defendant, of the debt of her agent, but the object was to show, by proof of her acts and acknowledgments, that the debt was her own; and that the agent bound her by his gestion of her business, his acts of administration of her affairs.

The testimony was properly admitted; and it makes this a very plain case. Vance proves the correctness of the accounts, and frequent recognitions of their correctness by Mrs. O'Neill. At the close of his agency there was a disagreement between him and Mrs. O'Neill as to the acts of his agency. J. A. Snider was the attorney of defendant, employed to settle this disagreement between her and Vance. He procured from plaintiffs the account sued on for the purpose of this settlement. Defendant, then Mrs. Kennedy, had the benefit of the advice and assistance of her husband, and of an experienced counselor. Her only complaint was as to the excessive interest and the commissions charged. Nothing was said about want of authority in Vance, nor was any complaint made as against plaintiffs. She complained of her agent; and that was the whole matter to be settled. Mr. Snider went through the accounts, and he made a statement showing the amount which she claimed to be excessive. The settlement was made on the eleventh May, 1875, witnessed by a written instrument, which shows the payment to her by Vance of \$7099 06. Vance says "this was to satisfy her for all objections she made against contracts he contracted in her name, the account sued on in this action included. The account sued on in this case was made the basis of the final settlement made between witness and defendant."

Snider says: "The objections to the account sued on in this action included the sum specified in the act of settlement, the same being \$7099 06. Witness made up, in this settlement, a full account of the excessive interest and commissions embraced in the account sued on."

Vance proves frequent recognitions, by defendant, of his acts as her agent; that he submitted to her, at different times, accounts of his transactions, which she acknowledged as correct. Vance gave up all claim for compensation for his services as agent, that is, in addition to the \$7099 06, which he paid Mrs. Kennedy, he acknowledged payment in full for his services.

Sentell and McLean both prove that Mrs. Kennedy was in the office of Sentell & Co. in February, 1876; that Sentell showed the account to her, and asked her to examine it, "and to state her objections to it, if any she had. She examined it, and replied that the account was correct, and that she would pay it as soon as she could." She refused to close the account by note, as Sentell wished her to do, but she said if she made a good crop she would pay it all that year; if she did not make a full crop, she would pay according to the crop, from year to year, until the whole was liquidated.

The account rendered tenth May, 1875, shows that the entire proceeds of the forty bales of cotton shipped after Vance's agency terminated, were left in the hands of Sentell & Co. on account of her indebtedness; and that account and the one rendered twenty-first of February, 1876, show no charge to her debit except for interest accrued, and commissions.

It is impossible to admit that defendant was ignorant, at the time of this interview, of the particulars of the account, because this was some nine or ten months after the final settlement between her and Vance, when the account had been canvassed, thoroughly examined, and all her objections had been embodied in a detailed statement, which was made the basis of, and included in, the final settlement between her and her agent.

The question in this case was not as to any promise by parol to pay interest above five per cent, nor as to any obligation on her part to pay commissions for advances. The account rendered by Sentell & Co. showed a certain amount due by her. Conceding the authority of Vance, her agent, to bind her, she claimed of him such portions of that account, excessive interest and commissions, as she was not legally bound to pay. The settlement between her and Vance left nothing open to dispute between her and Sentell & Co. Having received from Vance the equivalent of the charges in the account of which she complained, if she should now be allowed a deduction for these charges, they would be paid to her twice: once, in the settlement with Vance, in May, 1875, and again by deducting them from the account. No judicial tribunal should countenance such a claim. Defendant is bound to pay the whole amount, balance shown by the account ending the sixteenth of May, 1874, and the invoice of twenty-sixth of July, 1873, with interest to the sixteenth of May, 1874,

aggregating \$5280 20; and one hundred dollars, cash, twentieth of October, 1874, to be credited with \$2559 40, proceeds of sale of forty bales of cotton, twenty-fourth of February, 1875.

It is not possible to make out a more complete case of ratification, by a principal of the acts of an agent, than is established by the proof in this case; and there was no necessity to go into the particulars of the accounts, because the result was acknowledged and admitted to be correct, except the interest and commissions, which were allowed, corrected, and paid by Vance.

Defendant called two witnesses only, neither of whom proved any thing in her favor. One of them said, on cross-examination, that few farmers on Red river or elsewhere made any money for the last six years; and that a great many of the farmers on Red river, "for years past, have been running their plantations on advances from their merchants."

The other witness says he knows that the Kingston place, on which Mrs. O'Neill lived, "if correctly managed, would have made a profit from 1871 to 1874." On cross-examination, he says "he does not believe the river planters in Bossier parish have made much money from the year 1871 to 1874, inclusive. Some of the planters have been running their plantations on advances made them by their merchants."

Mrs. Kennedy's acknowledgment and verbal promise to pay the account, do not bind her to pay eight per cent interest, or commissions, since the sixteenth of May, 1874. She is bound to pay the amount due on the sixteenth of May, 1874, not because of any promise to do so, but because the settlement with Vance imposes that obligation on her; and she has no right to claim any deduction on account of the interest and commissions charged up to the sixteenth of May, 1874, because she received the equivalent from Vance, in order that she might pay the whole amount of debt incurred during his agency, including interest and commissions, of which she complained, without loss or detriment to her.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be so amended as to read as follows: "That G. W. Sentell & Co., in liquidation, plaintiffs and appellees, do have and recover of Mrs. Mattie G. Kennedy, wife of P. J. Kennedy, defendant and appellant, \$5280 20, with interest at the rate of five per cent per annum, from the sixteenth day of May, 1874, until paid, and the additional sum of one hundred dollars, with like interest, from the twentieth day of October, 1874, until paid, subject to a credit of \$2559 40, of date twenty-fourth of February, 1875," and that as thus amended the said judgment be affirmed with costs.

Mr. Justice Egan took no part in this decision.

No. 696.

THE STATE EX REL. O. J. FORSTALL VS. THE BOARD OF LIQUIDATORS.

The act of 1875 requiring a final decree of this court as to validity of certain "doubtful" bonds, enumerated therein, before the Board of Liquidators will be permitted to fund them, does not require that there should be a final decree on every individual bond of a certain issue.

A final decree of this court affirming the validity of one of the bonds of a certain issue (under ban), removes the taint from that issue, and puts all of its bonds on the same footing with the other bonds of the State that have not been legislatively tainted. But this restoration to legitimacy of those bonds does not give their holders the right to compel the Board of Liquidators, by mandamus, to fund them.

The Board of Liquidators have a certain discretionary power as to the funding of all State bonds, and warrants, and hence can not be compelled to fund them by the summary process of mandamus.

A PPEAL from the Fifth District Court, parish of Orleans. *Rogers, J.*

W. W. Howe, T. A. Flanagan, and G. H. Braughn, for relator.

H. N. Ogden, Attorney General, and J. C. Egan, Assistant Attorney General, for defendant.

The opinion of the court was delivered by

MANNING, C. J. The relator alleges that he holds, with full power to fund, five hundred and seventy-nine bonds of the State for five hundred dollars each, with their coupons, issued under the act of February 25th, 1870, and eighty-eight bonds of the State for one thousand dollars each, with coupons, issued under the Act of March 26th, 1867, all of which are known and commonly designated as Levee bonds, and are valid obligations of the State, and were issued for a valuable consideration. He avers that these bonds have been thus declared by the Supreme Court of this State, as is required by the Act of May 17th 1875, and he has therefore the right to have these bonds exchanged for the Consolidated Bonds of the State, the required judgment of the Supreme Court having been pronounced in the suit whereto the present relator was a party, and which, with the opinion of the court accompanying the decree, is published in the 27th Annual Reports of this court, page 577. He further avers that the Board of Liquidation refuse to fund the bonds presented by him for that purpose, notwithstanding this final decree of the Supreme Court, and he prayed and obtained a writ of mandamus to compel the funding.

Respondent, answering the rule to shew cause why the mandamus should not be made peremptory, denies that these bonds are valid obligations of the State, or that they were issued in conformity to law and for a valid consideration, and alleges that the Board of Liquidation is prohibited from funding the bonds by the Act of 1875 until every one of

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them has been declared valid by the Supreme Court, and legally issued, and that no such decree has ever been obtained upon these bonds.

The lower court refused to make the mandamus peremptory, and the relator appeals.

The main question for our decision is, whether the legislative requirement, contained in the act of May 17th 1875, imposes upon the Board of Liquidation the duty of refusing to fund every bond until it has been verified by a final decree of this court as legal and valid, and that it was issued in conformity to law, and not in violation of the Federal or State constitutions, and had a valid consideration; or whether such decree, rendered upon any bond, has relation to all others of the same issue or series, and is therefore in effect that final decree which that Act makes the duty of the Board to require.

In May 1875 the present relator applied for a mandamus to compel the funding of certain enumerated bonds issued under the Acts of February 25th 1870, and March 26th 1867, alleging that the Board of Liquidation had refused to fund them, and further averring that the act of 1875 was unconstitutional, and hence the requirement above recited was null. In that suit he prayed that that act be declared unconstitutional; and that the Board be commanded to fund the bonds mentioned in his petition.

The Supreme Court pronounced the act of 1875 constitutional, thereby affirming that the duty of the Board was to refuse to fund the bonds of relator until they had been declared legal and valid obligations of the State by a final decree of that court, and then proceeded to make that decree *quoad* the bonds of relator, but restricting its operation by the formal expression, "we desire to be distinctly understood that we are expressing no opinion upon the validity of any bonds except those before us and in the hands of the relator." *State ex rel. Forstall v. Board of Liquidation*, 27 Annual, 582.

Manifestly this is not the final decree required by the Act of 1875 which can be invoked by the relator as the authority to the Board to fund the bonds now presented. The decree repels such use of it in express language. Apparently anticipating that the relator might so construe the language of the court as to justify him in demanding the funding of all other bonds of same series or issue as those included in that decree, care was taken to inform him and the Board that such construction was condemned beforehand.

The relator then is the relator now. His prayer now is that the Board be commanded to fund "each and all of the above-described bonds as belonging to those issues covered by the judgment of the Supreme Court rendered in the previous suit." We have seen that the judgment of the Supreme Court expressly excluded from its operation these, and

all other bonds, except those embraced in that suit. The Board had not before them such final decree as the Act of 1875 requires, and their refusal to fund the bonds presented by the relator in this suit was proper.

In the trial of the issue below, evidence was received, without objection from the Attorney General, of the legality and validity of the bonds included in this suit. The bonds were offered in evidence, and the originals are brought up before us. We are thus enabled to pass upon the questions of their legality, validity, and good consideration, and to ascertain whether they have the features or qualities declared indispensable by the act of 1875, and we find that they are legal and valid obligations of this State, that they were issued in strict conformity to law, and not in violation of the constitution of the United States or of this State, and for a valuable consideration.

We might stop here, and leave still open the question whether a final decree of this court upon one bond was sufficient warrant to the Board to fund all bonds of the same issue. But in a matter of such large public concern, where the interests and public credit of the State are in some sort involved, we have not thought it improper to accept the invitation of the law officers of the Government to define with more precision what is that 'final decree' which the Act of 1875 requires every holder of 'questioned and doubtful' bonds to obtain before he can compel the Board to fund them.

It is not necessary that every holder of every bond, or the holder of a large number of bonds of same issue, should obtain a judgment of this court upon them before they can be funded, if there has been a final decree rendered upon other bonds of the same issue. But on the other hand, such decree upon bonds of a certain issue does not of itself validate the whole of that issue, in such manner and with such effect, as to deprive the Board of Liquidation of the power to exercise any discretion whatever in relation to the funding of any bonds that may be presented to them.

The propriety and necessity of this construction will be apparent upon a brief statement of the legislation touching it. The funding Act (Acts 1874, p. 89,) constituted a Board through whose action the bonded debt of the State should be consolidated, and directed that the holders of bonds or warrants should present them to this Board for exchange. If a majority of the Board should reject any bonds or warrants thus presented, the holder of them might apply by petition to the proper court for relief, and if final judgment should be rendered in his favor, it should then be the duty of the Board to fund his bonds or warrants.

Another act was passed in the next year, (Acts 1875, p. 110,) which contained a list of bonds that the General Assembly pronounced 'questioned and doubtful,' and reversed the duty of the Board as to them.

State ex rel. Forstall vs. Board of Liquidators.

None in that *liste des proscrits* could be funded by the Board until the holders of them had obtained a final decree of this court attesting them, as in that act directed. The language of the act is—that the following issue of bonds and warrants, so far as the same may be now outstanding, are declared questioned and doubtful. We held last winter (*Exchange Bank vs. Board of Liquidation*,) not yet reported, that the holder of bonds included in that list could not compel the Board by mandamus to fund them until he was fortified by a decree to that end.

A decree upon one or more of the same issue removes the whole of that issue from the list of questioned and doubtful bonds, but they instantly fall in the condition of all other bonds that were never on that list. The Board have the right to refuse to fund any and all bonds and warrants. Its duty is to refuse to fund all that come to them tainted, without regard to the fact whether they are in the questioned list or not. The funding act contemplates a refusal, and provides a remedy by petition to the proper court for relief. The supplemental act makes it the duty of the Board *not* to fund certain issues. A decree upon one bond of either of those issues relieves the Board of the obligation not to fund others of the same issue, but it does not impose upon the Board the obligation to fund all of that issue. As to all other bonds of the same issue as those declared valid by this decree, the Board has the same discretion that it has touching bonds that were never in the questioned list, and it must exercise that discretion.

We are very warmly urged to go further, and to rule that the Board must fund, without discretion, all bonds of the same issue, if any one bond of that issue has received this court's *imprimatur*. We are told that such ruling is required to sustain the public credit, and that without it, a cloud will rest upon certain classes of public securities. We are unable to perceive how we increase the denseness of that shadow thrown over the list of questioned bonds by the Legislature. On the 17th of May 1875 that body in solemn form declared, there were bonds of the State to the amount of fourteen million three hundred and twenty thousand five hundred dollars which were of doubtful validity. This was a legislative warning by the State to the Board of Liquidation, and to her Judges, to permit no bonds of the proscribed list to be funded without scrutiny, nor until they had been declared legal and valid obligations of the State, and that they had been issued in strict conformity to law, and not in violation of the constitution of this State or of the United States, and for a valuable consideration.

That there were some bonds in that list that had these requisites is manifest from the decrees heretofore rendered, and this decree now rendered, to that effect. That there were other bonds in that list that had not those requisites, is inferrible from the legislative declaration which

put them under ban. We cannot deprive the Board of Liquidation of the power of scrutinizing each separate bond and warrant, and accepting it for funding, or rejecting it, as the act of 1874 empowered it to do. And the fact that we do this is the surest warrant to the holders of the genuine bonds that the public faith is to be guarded and preserved. Therefore

It is ordered, adjudged, and decreed that the judgment of the lower court is affirmed, which refuses to make the mandamus obtained by relator, peremptory, because of the decree of this court rendered in suit No. 556. And it is further decreed that the bonds set forth in the relator's petition are now declared to be legal and valid obligations of the State of Louisiana, and they were issued in strict conformity to law, and not in violation of the constitution of the United States or of this State, and for a valid consideration. It is further ordered that the relator pay the costs of both courts.

No. 737.

SUCCESSION OF E. E. GRACE. OPPOSITION OF CREDITORS AND HEIRS.

An order of court granting a continuance of a case can not be appealed from.

A PPEAL from the Parish Court, parish of Ouachita. *Slack, J.*

R. W. & R. Richardson, for succession and appellee.

Cobb & Gunby, for Marx, opponent.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

MANNING, C. J. Hugh Yongue, administrator of the succession of E. E. Grace, having filed his final account, its homologation was opposed by Elias Miller, tutor to a minor child of the deceased, and by Amelia Miller. At the June term just past, a continuance was prayed by the tutor, and his attorney filed an affidavit in support thereof, and the judge ordered the continuance thus prayed.

Marx, a creditor of the deceased duly acknowledged, prayed an appeal from this order. The tutor to the minor, and the administrator, move in this court to dismiss the appeal on various grounds, the first of which is that no appeal lies from an order of continuance. The motion must prevail.

The appellant contends that his appeal is properly taken, because it is from an interlocutory order which works him irreparable injury. The

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injury occasioned by mere delay is not irreparable, and it has been frequently held that no appeal will lie from an order granting a continuance productive of mere delay. In *Compton vs. Patterson*, 1 New Series, 597, it was so expressly ruled. In the *State vs. Judge of the Parish Court*, 15 La. 521, this court refused a mandamus to compel the judge to proceed to a trial of a cause in which he had granted a continuance, and the refusal was put upon the ground that the court would be called on to revise an order from which no appeal could be taken. And this was in accordance with the previous ruling in *State vs. Esnault*, 12 Martin, 488.

The appellant's counsel refer us to *Duplessis vs. Lastrapes*, 11 Rob. 451, in support of the doctrine that an appeal will lie from an interlocutory judgment which may work an irreparable injury. That is undisputed, and is as well settled as the other ruling, that no appeal lies from an order of continuance. Duplessis' case was an action to fix the boundaries of land. The defendants had called in their neighbor, whose boundary might be affected by the displacement of theirs, and that neighbor had called his vendor in warranty, and this vendor wanted a continuance to call in his vendor. The court said—"if it be conceded that the defendant had the right of making his neighbors parties, and they their own, there would be no limitation to the number of parties that might thus be brought in." The suit would thus be procrastinated to an indefinite period.

The reason of the rule, that a mere order of continuance can not be appealed from, is its futility, and the wisdom of that rule was never better illustrated than in the present case. For what is the object of this appeal, and how is the appellant to be benefitted by it?

The concluding sentence of his counsel's brief asks us to reverse the order of continuance granted by the parish judge, and proceed to render such judgment as the parish court should have rendered, *i. e.* order the distribution of the funds of the estate among the creditors acknowledged, and placed on the tableau by the administrator.

As we have not original jurisdiction, there must be rendered some judgment by the lower court for us to revise. There has been neither trial nor judgment below. The parish judge has not entered any judgment, in or by which the claim of any creditor has been either allowed or rejected, nor has he approved or disapproved any charge made by the administrator. No issue, raised by the pleadings, has been passed on by him. What judgment should we revise, if we undertook to do what the appellant now asks of us? There is but one judgment, order, or decree, and that is, that the case be continued.

Assume that the order of continuance was improperly made. Assume that an appeal from such order is permissible, and that we so declare, our

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judgment would be that the continuance was improperly granted, and the case must necessarily be remanded for trial. Obviously we should assume original jurisdiction if we were to pass upon the account, or any opposition thereto. It has not been considered or adjudged in any manner by the lower court, and we must have before us a judgment of that court upon the issues, or one of them, to be revised. Here there is no judgment, either to be affirmed, amended, or reversed. The sole matter before us in the record is an order of continuance. Meanwhile, no action is taken in the case in the lower court, and thus the appellant, who complains of an improper delay caused by the order of the parish judge, is himself the cause of a greater delay caused by his appeal.

It is unnecessary to consider any other of the grounds of appellees' motion to dismiss.

It is ordered and decreed that the appeal is dismissed at the costs of appellant.

No. 709.

JOHN G. SANDERS VS. ADELINE EDWARDS, ADMINISTRATRIX.

When a motion for an appeal is made in open court, during the same term at which judgment is rendered, no citation of appellee is necessary.
The surety of an administratrix who fails to perform her duties as prescribed by law, has a right to be released from his bond.

A PPEAL from the Parish Court of Ouachita parish. *Slack, J.*

Robert Ray, for plaintiff and appellant.

Cobb & Gunby, for defendant.

The opinion of the court was delivered by

EGAN, J. This is a proceeding by John G. Sanders, surety on the bond of Adeline Edwards, administratrix, to require the administratrix to give a new bond and release said Sanders, and in default, for her removal and the appointment of a new administrator, under articles 3069 and 3070, R. C. C.

The defendant's counsel moves to dismiss this appeal (which was taken by the surety from an adverse judgment in the court below), on two grounds:

First—The want of jurisdiction in this court *ratione materiæ*; and,

Second—Because the appeal was taken by motion in open court, and the defendant and appellee had made no appearance then, and never had any citation or notice of appeal as required by law.

Sanders vs. Adeline Edwards.

The court has jurisdiction. The amount of the bond from which the surety seeks release is one thousand dollars, and that of the succession over five hundred.

As to the want of citation or other notice of appeal, it was taken by motion in open court at the same term at which the judgment was rendered; and the order of appeal in the record states, besides, that defendant's counsel took cognizance of the appeal, being at the time present. This, however, was unnecessary when the appeal was taken by motion at the same term at which judgment was rendered. The law makes no distinction in this respect between judgments rendered by default and otherwise. See C. P., article 573.

The motion to dismiss is overruled.

On the merits, it appears that Moses T. Edwards died in 1872, and defendant, Adeline Edwards, his surviving wife, was appointed administratrix on the thirtieth of September of that year; that the succession amounted originally to over two thousand dollars; that the administratrix, under order of court, sold personal property for cash to pay debts to the amount of near five hundred dollars in January, 1873; that on the second of February, 1877, she applied for and obtained an order of court to sell for the payment of debts, and did accordingly sell a house and lot in Monroe for five hundred dollars. It was stated at bar, and not denied, that this sale was on twelve months time at the first offering. The record is, however, silent on this subject.

It appears further probable that the deceased left money at his death, though no amount is stated, and finally, that the administratrix, to use the language of the judge *a quo* in a statement of facts in the record, "has filed no account or exhibit of the succession funds." Under this state of facts, we think that the surety had a right to fear that the administratrix was so far mismanaging the succession that he was in danger of being injured thereby. The law directs how successions shall be administered, and it may well be considered that sureties on the bonds of administrators contract with a view to it. It is made the duty of the administratrix to file annual accounts and to apply for and obtain the orders of court to pay debts whenever there are funds in hand for that purpose. This the present defendant has not done, nor has she shown any reason for not doing so, although she had funds in hand derived from the sale of property, and perhaps otherwise, and when notified of the apprehensions and application of her surety she has not pretended to excuse or justify herself; and although nearly five years have elapsed since the opening of the succession, she has made no exhibit of its condition or of her dealings with it. We think this is a proper case for the relief contemplated by articles 3069 and 3070 of the Civil Code. If the defendant wishes to continue the administration she may do so by giving

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new security. She can not deal so loosely and retain the old one against his will.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided and reversed, that the defendant, Mrs. Adeline Edwards, give a new bond and security according to law for her faithful administration of the succession of Moses T. Edwards, deceased, and upon failure to do so within three days after the filing of the mandate in this case in the court below, that she be forthwith removed from the administration of said succession, and that the judge proceed at once to the appointment of a new administrator, who shall be required to give bond and security according to law; and thereupon, that is, upon the execution of new and sufficient bond according to law, either by the present administratrix or by a new administrator to be appointed as stated that the said John G. Sanders be relieved from any and all responsibility for any acts of maladministration of his principal from and after the date of execution and acceptance of said new bond. It is further ordered that the defendant, Mrs. Adeline Edwards, pay costs of both courts.

No. 734.

M. GILLIS vs. B. E. CARTER ET AL.

29	698
48	391
29	698
111	757
111	1098

An intervenor may make whatever amendments of his pleadings that the plaintiff may make, provided the amendments do not retard the main suit. Whoever claims the ownership of property which has been sold at sheriff's sale, under a judgment not absolutely null, must first proceed by a direct action to annul the judgment. Neither such a judgment, nor the sheriff's sale made under it can be assailed collaterally. A judgment rendered on a prescribed note is not an absolute nullity.

A PPEAL from the Twelfth Judicial District Court, parish of Franklin.
Crawford, J.
Boatner & Elam, for plaintiff and appellee.
W. W. Farmer, for defendants and intervenors.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

MANNING, C. J. The appellee moves to dismiss this appeal on two grounds;

1. The transcript now before us is the same as that brought up at the last term, when the appeal then taken was dismissed, except the new matter which consists of the petition of appeal, the order, the service,

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etc., and the old transcript ought not to have been withdrawn, and the new matter appended to it.

2. The certificate of the clerk does not cover this new matter, and is therefore insufficient.

These objections are frivolous as grounds for dismissal. There is no reason why the old transcript should not be used, if permission to withdraw it had been obtained, and we must assume such permission was obtained. It saved costs.

The new certificate is in proper form, and covers the whole.

The motion is denied.

ON THE MERITS.

In September 1858 James P. Byrne bought of one Cockerham a tract of land in Franklin parish for fourteen hundred dollars, and executed three notes therefor; one for three hundred dollars payable on March 1. 1859, and two for five hundred and fifty dollars each payable on March 1, 1860 and 1861. A special mortgage was retained to secure the payment of the notes.

In July 1866 the commercial firm of Gillis & Ferguson instituted suit upon one of these mortgage notes for \$550, and upon another note of \$556 80, and a third for \$48. Byrne was dead, and his widow had married Preston Hampton, and there were three minor children of Byrne surviving him. Judgment was rendered in that suit upon the mortgage note alone, with recognition of the mortgage, and was signed in March 1867. Three years afterwards execution issued, and the sale was enjoined by Mrs. Hampton. It was made finally on Dec. 2 1871, when the present plaintiff became the purchaser. He sues now to recover the land, and for the value of its use and occupation during 1872 and every succeeding year the defendant may continue to occupy it.

The suit was instituted in June 1873. Carter was in possession under a lease, as alleged, from Preston Hampton, and both were made parties. Carter took no notice of the suit. Hampton pleaded the general issue. The three children of Byrne intervened, the oldest as an emancipated minor, and the other two by their under tutor, William Hampton, and claimed ownership of the land by inheritance from their father, alleging that the title under which the plaintiff claims is an absolute nullity, because the note upon which judgment was rendered in Gillis & Ferguson's suit was prescribed, and the judgment was upon a consent—because the acts of the sheriff in executing the process upon that judgment were irregular, there being no notice of seizure served upon any person au-

thorized to represent the intervenors—and the administrator or curator of the father's succession was not a party to that suit.

The plaintiff at once excepted to the intervention for this, that the under tutor cannot represent minors unless there is a conflict of interest between them and the tutrix, and such conflict is not alleged, whereupon the intervenors prayed leave to amend in that respect. But plaintiff objected upon the grounds, that an intervenor cannot amend his pleadings at all, and if he can, that he cannot amend to cure a defect to which exception has been specially made, and thus save himself from the effects of such exception. The court refused permission to amend.

An intervenor is entitled to amend under the same circumstances that a plaintiff is, restricted always by the condition which perpetually attaches to him that he shall not retard the principal suit. Even if amendment were made of the petition of intervention, if the intervenor failed to shew on the trial the circumstances that required the under tutor to represent the minors, advantage of it could be taken then. The circumstances shewn here were, that the tutrix was a party in her personal capacity also to the suit upon the note, in which judgment was rendered in favor of Gillis & Ferguson, and which the intervenors now seek to annul.

The plaintiff answered the intervention by denying that the intervenors could attack the judgment, under which he claimed title, without bringing all the parties to that judgment and sale before the court, and that the intervenors were represented in that suit, and the judgment binds them.

The intervenor in a petitory action stands in the position of plaintiff, and must establish his title. *Baldree v. Davenport*, 7 Annual, 587. If he claims by inheritance from a vendee, whose rights of property have been apparently divested by judicial proceedings in enforcing payment of the price to the vendor, or the holder of the vendor's privilege, he must attack the proceedings in an action against all who were parties to them. It is urged by the intervenors that these proceedings were void and of no effect, and that the nullities set forth by them are absolute and not relative.

A judgment upon a prescribed note is not an absolute nullity. It is not a nullity of any kind as against a party who could plead prescription, and failed to do it. The debt may have been acknowledged, or its prescription may be questionable. When that judgment was rendered, a plea of prescription, interposed by the defendants in Franklin parish to the claim of the plaintiffs resident in New Orleans, would have been overruled under our jurisprudence as then interpreted. The text of the law is now as then.

The plaintiff holds under a recorded title, translativo of property, and

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it has been held (*Anderson v. Carroll* 23 Annual, 175.) that in the absence of any charge of simulation, the question of the nullity of the judgment under which the sale was made, because the sheriff failed to observe all the forms of law in making the seizure, cannot be inquired into collaterally by a creditor who has caused the seizure of the property without reference to the sale. He must attack the sheriff's sale directly. The intervenors will insist that they do attack the sale directly in this action, and besides they are heirs, but they have not all the parties before the court. They cannot conclude the interests of the plaintiffs in the judgment, who would be bound to the purchaser in case of the annulment of his title, nor of the other seized debtor without making them parties to the suit.

The land belonged to the community of acquets, and the surviving widow was a party to the suit. Her undivided half of the property was unquestionably acquired by the plaintiff. We find in the record that she was confirmed as natural tutrix to the minor children, who are the present intervenors, Aug. 31, 1866, and filed an exception to the form of the action in the following month, in which she states that she is acting "in her own right and on the part of her minor children." We are not prepared to say they were not represented with this appearance of their tutrix before us, and why the judgment should have recited in addition to the usual words, "by reason of the law and the evidence", the additional clause, "and the consent of parties" does not appear. The proof is ample to justify the judgment. Both the note and the recorded act of mortgage were in evidence, and this latter was also the act of sale, in which was recited that this note was part of the price, from which resulted the privilege of the vendor in addition to the mortgage.

The minors who are here claiming ownership of the land in controversy, because of alleged non-compliance with certain forms of procedure, are themselves to be reproached with non-compliance, either by their ancestor or themselves, with the fundamental rule which obliges the buyer of a thing to pay the price of the sale. Civil Code art. 2527.

J. D. Byrne did not pay for the land. It was sold to him without any cash payment. The note which represented part of the price was merged in a judgment, under which the plaintiff bought. The debt which the father owed was thus paid by the plaintiff when he bought the land, and the children cannot complain if their demand to wrest the land from him is denied. He who seeks equity must do equity. He who invokes the law to permit him to grasp that for which he has not paid, is not injured when he is required first to acquit his own obligation to pay its price.

Judgment affirmed.

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ON APPLICATION FOR REHEARING.

The counsel for the defendants and for the intervenors have applied for a rehearing, and in behalf of the former claim that their plea of prescription of one year to the demand of the plaintiff for remuneration for the use and occupancy of the land during 1872, was not considered by the court. A rehearing is therefore granted for the purpose of passing upon that plea.

ON REHEARING.

The citation was served June 13th. 1873. The demand for remuneration for the use of the land during 1872 became exigible January 1. 1873. The prescription of one year does not therefore apply. The plea is overruled, and It is ordered, and decreed that our former judgment remain undisturbed.

No. 744.

SUCCESSION OF J. G. WHITE.

It is the financial condition of the widow at the moment of her husband's death, and not her condition at the time she applies for the widow's portion of one thousand dollars, which determines whether she is entitled to that portion. The removal of the widow from this to another State, will not impair her right to the widow's portion. The creditors of a succession can not demand that the widow shall give security for the safe return of the widow's portion to the heirs.

A PPEAL from the Parish Court of Bossier parish. *Fort, J.*

J. D. Watkins, for opponent and appellant.

J. A. Snider, for administratrix.

ON MOTION TO DISMISS.

The opinion of the court was delivered by
MANNING, C. J. The administratrix moves to dismiss on the ground that the claim of the opponent is less than five hundred dollars.

The claim of the opponent is not in controversy. It is acknowledged by the administratrix. He opposes the allowance of the widow's portion which exceeds that sum. The motion is denied.

ON THE MERITS.

J. G. White died in Bossier parish in July 1876. His widow was appointed administratrix of his succession, and the property was sold by

Succession of White.

her under an order of the parish court for the payment of debts. The sales were made in December of same year, and about the time of the last sale, the widow removed to Texas, and has not returned.

On March 2d 1877, a tableau was filed for her, ranking the debts of the deceased, and of the succession, upon which her widow's claim of one thousand dollars is placed. Lane, an acknowledged creditor, opposes it. The succession is confessedly insolvent.

There is no doubt that the widow was in necessitous circumstances at, and after her husband's death, and at the time of filing the tableau. The opponent insists upon the authority of McCoy's case, (26 Annual 686.) that the condition of the widow at the time the claim is made must determine her right. This is in direct conflict with the dictum of Gimble v. Goode, (13 Annual 352); also Suc. Marx, (27 Annual 99.) that the right of the widow and of the minor children of a decedent to the portion secured to them under the act of 1852, vests in them at the moment of the death of the deceased, and their condition then, and not at any subsequent time, is the test of the rightfulness of their claim. We think this is the sounder doctrine, and is more in harmony with the manifest intent of the act, which was to ward off from the widow and young children of one recently dead, the misery of unmitigated destitution, and to cover, as with a shield, these helpless mourners from the pitiless shafts of poverty, at the moment when the protecting arm of the husband and father was made powerless by death.

It is also contended by opponent that whatever may be the time that controls the right of the necessitous widow, if she does not reside in this State at the time her portion is formally demanded, she will not be entitled to receive it. On the other hand we are referred to a reported case, Suc. of Christe, (20 Annual 383.) wherein it was ruled that a surviving necessitous widow, who had never been in the State, was entitled to the benefit of the act of 1852, a dictum we do not approve.

As the right of Mrs. White accrued at the moment of her husband's death, her subsequent removal from the State did not annihilate it. She was a resident of Louisiana during the coverture, and at its termination, and may well be considered as falling within the designation of 'its own widows', used in Stewart's case (12 Annual 89.) when applying a different principle.

The opponent argues that as the widow in this case has only the usufruct, if she is permitted to take the money out of the State, the minor children may be deprived of the benefit which the act secures to them. To this suggestion it may be answered, 1. that it does not concern the creditor what becomes of the money if it be once ascertained and determined that it does not belong to the fund which he can make available to the payment of his debt. And 2. we have no power to compel the

widow to give security for the production of the money at her death. She is the mother of the minors and hence their natural tutrix.

The legislature has not thought proper to protect the interests of the minor further than they are in the Act which created this special provision for them, although twenty-five years of experience under it must have presented cases not unlike the present, and it is not for us to supply any omission which may be discovered in practically applying it.

Judgment affirmed.

No. 708.

THE STATE vs. E. R. KING.

The recovery of a fine for the violation of a criminal statute is prescribed in six months from the time the fine is incurred.

A PPEAL from the Eleventh Judicial District Court, parish of Lincoln. *Graham, J.*

Allen Barksdale, District Attorney, for the State.

Garrett & Garrett, for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. The defendant was indicted, tried and convicted, of the offense of retailing liquor without a license, under section 910 of Revised Statutes.

The indictment charges that the offense was committed on tenth December, 1875, and was presented and filed November 16, 1876, more than eleven months after the offense.

The accused filed a motion to quash, or plea in bar of, said indictment, on the ground that the prosecution was barred by the prescription of six months, under section 986 R. S. The plea was overruled and defendant excepted.

There was a verdict of guilty, and the court adjudged and decreed that the defendant pay a fine of \$310, and *in default* of paying said fine that he be imprisoned for twenty days in the parish jail. Defendant appeals.

The ruling of the court was erroneous. This is a criminal "*prosecution*" "for a fine." Imprisonment is *no part of the penalty* for committing the offense charged, but is the mere consequence of *not paying the fine imposed*. The court under said section could not inflict, *as a punishment for retailing liquor*, a term of imprisonment. It could only fine the guilty party. The prosecution, therefore, was to recover or inflict "a fine," and was therefore prescribed. The law says no person "shall be prosecuted for any fine, * * * under any law of this State, unless

State vs. King.

the prosecution for the same shall be instituted *within six months from the time of incurring such fine,*" etc. R. S., sec. 986.

We think that Merrick, C. J., correctly states the law in the case of *State vs. Markham*, 15 An. 500.

It is therefore ordered, adjudged, and decreed that the verdict and judgment appealed from be set aside and annulled; and it is now decreed that the plea of prescription made by defendant in bar of this prosecution be sustained and the indictment quashed.

No. 656.

STATE EX REL. FRANK VAUGHAN, DISTRICT ATTORNEY PRO TEMPORE, VS.
W. L. RICHMOND, SHERIFF.

The law which empowers judges to suspend sheriffs from office on account of the latter's neglect, or refusal to perform their duties, is constitutional.
The office of district attorney *pro tempore* has not been abolished.

A PPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J.*

Frank Vaughan, District Attorney *pro tem.*, for relator and appellee,
Morrison & Farmer and *Newton & Hall*, for respondent.

The opinion of the court was delivered by

DEBLANC, J. On the thirteenth of June 1876, the defendant was, by a decree rendered by the judge of the fourteenth district, suspended from the discharge of his duties as the sheriff of the parish of Morehouse. That decree is based on a written statement filed by the district attorney *pro tempore*, that said sheriff has willfully failed and neglected to execute writs and orders to him directed, and to make return of the same to the courts by which they were issued.

From that decree, defendant has appealed, and, as he did before the district judge, he contends here:

First—That the office of district attorney *pro tempore* has been abolished by the first section of act No. 44, approved on the ninth of March 1874, and that, as it is not sworn to, the statement of Frank Vaughn, as a private citizen, is insufficient.

Second—That, if Vaughan was a district attorney *pro tempore*, he was without authority to act in this proceeding, because the district attorney was in attendance on the lower court, when the aforesaid statement was filed.

Third—That, so far as they relate to the suspension of sheriffs from office, sections 1177, 3592 and 3593 of the Revised Statutes of 1870, are

unconstitutional and void, because—1st: the object of the law is not expressed in its title—2d: a sheriff can be removed from office but by the General Assembly.

First—On the twenty-fourth day of February 1876, one Ingram Law killed R. A. Phelps. He was indicted for murder and a true bill found against him. At the foot of the indictment, there is the following declaration, written by the district attorney. "I refuse to sign this bill, for the reason of my relationship to the accused, and for other reasons." It was after that refusal that the indictment was signed by Vaughan, as district attorney *pro tempore*.

Defendant's counsel contends that the office of district attorney *pro tempore* was abolished by an act of the Legislature of the ninth May 1874. We believe otherwise. 26 An. p. 548; State ex rel. Thos. Farrar vs. H. A. Garret.

It is true, as a general rule, that district attorneys *pro tem.* can represent the State only where the district attorneys are absent; but they can certainly do so, when, though present, the district attorneys are unable or unwilling to act. In this case, we must and do presume that, as one of the principal causes of the proceedings against the sheriff, was his failure to have arrested Law, the district attorney, for the reason which induced his first refusal, declined to attend to said proceeding and left that task to his substitute. Far from being an irregularity, this course was proper and commendable.

Second—In his able and exhaustive argument, the attorney representing the sheriff, contests the constitutionality of the law empowering the judge to suspend a sheriff. He maintains that this suspension is a removal, and that a sheriff can be legally removed but by the General Assembly.

What is a removal? It is the act of permanently displacing one from an office or post. What is a suspension? It is, exclusively, an interruption in the exercise of the officer's duties, of his authority.

In every land, under every form of government, as a censure or as a penalty, ministers and priests, civil and military officers have been suspended and deprived of their emoluments and privileges. In the armies of the world, though an officer may have paid with his blood the right of wearing his sword, the power to suspend him has never been denied. Why then, if a sheriff has disregarded the duties imposed upon him by his commission, his oath and the law, hesitate to check his flagrant incapacity, and guard society against the danger of his criminal negligence?

The delegation to a judge of the legitimate power to suspend a sheriff, when that sheriff has neglected or refused to perform his duties, is not prohibited by the constitution and not in conflict with any of its clauses.

The exercise of that power is indispensable to the existence of a court, for it would be far better to have no court, than to have one, the mandates of which are ridiculed, despised and resisted. Those mandates should ever be a terror to felons, and, to be a terror, they must be executed.

Third—One question remains to be examined, and that is:

Has defendant, in his capacity of sheriff of the parish of Morehouse, discharged the duties of his office? He has not.

Warrants were placed in his hands for the arrest of four parties indicted for murder. Two of those parties, Kennedy and Law, were fugitives from justice. One of them left the parish of Morehouse, but soon returned there. Two or three demonstrations were organized by the sheriff, for the published purpose of capturing those fugitives, but those demonstrations were too transparent to deceive any one. They were false pretenses, forged letters of credit drawn on the public credulity, and a notice to those who had violated the law, not to be on the highway, at the store, the club-room or the church; and, for these vain displays, these farces, the people are to be taxed.

Mr. Wright, one of the defendant's deputies, testified "that Law had been at his house in Bastrop: he started out three times with Richmond, to assist in arresting Law; the first time they went a mile out of town, the second time two miles and afterward three miles. Richmond wanted to go further, but the *posse* refused. It was raining and the *posse* thought the sheriff was drinking too much. He heard every morning that Law had been in town.

Mr. Rutledge said: Wright, the deputy sheriff, brought me a note, from Law, in which he asked me to come and see him.

Mr. Grant is a resident of Bastrop. Law was at his house, told him to inform Richmond that he had come to stand his trial and not to put himself to any trouble: that he did not want to surrender before the commencement of the jury session.

Richmond said: I do not think that those I summoned as a *posse* kept my movements secret. It seemed to be known all over town when I intended to go.

As to Kennedy, according to the declaration of McGowan, he has been in the parish of Morehouse, and about his father's place since one year or more.

J. A. Ross, the principal deputy of Richmond, declared that, since the latter was sheriff, he had in hand many warrants against parties who were not arrested, and that he never made a return with an affidavit thereto attached.

One of the deputy sheriffs suggested to Judge Bussey that if a sufficient reward was offered, somebody would arrest Law. He inquired,

from the judge, whether the son of Dr. Phelps was going to offer a reward or not.

McDowell was arrested for rape: defendant's deputy testifies that, while he was eating his breakfast, his prisoner got away. It took him by surprise, for in his own language: "previous to the time of escaping, the prisoner had made no effort to escape.

On the second of June 1876, Richmond was indicted and a true bill found against him, for having collected illegal fees; he was arrested and released on bond to appear before the district court.

We pass unnoticed the minor details.

Defendant was charged and stands convicted of a gross, manifest and unjustifiable negligence in the exercise of his duties as sheriff—of a negligence which amounts to a moral complicity with men indicted for murder. As remarked by Mr. Justice Martin, "those who minister in the temple of justice, from the highest to the lowest, should be above suspicion and reproach. None should serve at its altar, whose conduct is at variance with his obligations. Surely he, who can give his aid and sympathy to screen offenders, should not be trusted to take any agency in their prosecution." 2 N. S. p. 703.

The restricted lines of a parish or of a State should not place, beyond the reach of a warrant, those who are charged with murder. Those lines should be crossed, the murderer pursued, tracked and arrested. Until he accounts for the blood he has spilled, he should, in no corner of the world, be allowed to stop and to rest, much less should he be permitted to prowl, heedless and defiant, in the immediate vicinity of the temple of justice and the grave of the victim.

With as careless a sheriff as defendant was, the nefarious deeds of assassins and robbers would be encouraged and multiplied, for, they could, without apprehension, trample under their feet the laws of the State, of society and of God, the rights, the flesh and the lives of those who have been brought to trust to those laws for their protection.

In so far as it orders the suspension of defendant, as sheriff of the parish of Morehouse, there is no error in the decree appealed from, and that decree is affirmed with costs.

ON APPLICATION FOR REHEARING.

The opinion of the court was delivered by

MANNING, C. J. An application for rehearing has been made by the respondent's counsel. The zeal of the advocate has nearly betrayed him into indecorum. It would be justified if the consequences, imagined

and depicted by him, could legitimately ensue from our decision. His argument is that because the constitution has provided specific modes of *removing* certain officers, therefore a judge cannot suspend a subordinate officer of his court.

Disciplinary power belongs to a court from its constitution, and the purpose of its creation. The judge impersonates the law. He represents its majesty, its dignity, its authority. The officers of his court are necessarily under his supervision. If either of them grossly neglect or violate his duty, as by contemning his authority or refusing to obey his legal orders, he should punish him for contempt. But when the officer contemns the law itself, when he puts its mandates at defiance, when he wilfully neglects or refuses to serve the process by which a criminal is to be arrested, and thus mocks at and despises the law which prescribes his official conduct, it is proper that the exercise of his functions should be suspended. The power to protect itself is inherent in a court. It dare not permit the arm of the law to be palsied by the contumacy of its executive officer.

The constitution directs how certain officers shall be impeached, and also that all civil officers shall be removable by an address of the General Assembly, except those whose removal is otherwise provided for by the same instrument. (art. 106.) Thus much for the mode of removing. Then follows the provision to prevent an interruption of the public business because of a vacancy. (art. 122.) All officers shall continue to discharge the duties of their offices until their successors shall have been inducted into office, except in cases of impeachment or *suspension*. So then the suspension of any officer, so far from being discountenanced and abhorred by the constitution, is expressly mentioned in it. Such a thing may happen. The constitution foresees that it will happen.

The Legislature therefore provided for the particular case, where the court from its inherent power would have a right to suspend, and proceeded to guard it with restrictions. The act of 1868 prescribes the formal proceedings through and by which the sheriff or his deputy, or the coroner or a constable who has failed to make an arrest, may be brought before the court. The prosecuting officer of the court must bring the delinquency of the sheriff or other executive officer, to the knowledge of the judge by a written statement, and any other person may do this if he swears to the statement, and upon hearing all parties, the power of suspension is conferred. (Acts 1868, p. 161) The next section opens with these words:—it is the spirit and intention of this act that the several judges in this State shall have a general supervisory control over the officers appointed by the law to execute the writs issuing from, and the orders of the courts—and this is but the enunciation of that power that courts must have, and must exercise if need be, unless their

authority is to be reduced to impotency, and their personation of the vigor of the law to be transformed into a mere simulacrum.

The respondent says that a suspension sometimes may operate as a removal, as for instance when made near the close of the term of office. The enforcement of many laws produces effects not contemplated by the law.

And he adds, this power is liable to abuse. So is all power. But the exercise of this power under this law is surrounded with formalities and deliberation of proceeding that guard against rash action, and secure to the officer a fair hearing. The very presence of this appeal before us shews that the judge cannot act arbitrarily to the detriment of the officer, without the latter's right to have the causes of the suspension inquired into. And we have confined ourselves to the consideration of the suspension of an executive officer of a court by the judge of that court.

Rehearing refused.

DISSENTING OPINION.

EGAN, J. I regret that I have not been able to present fully the reasons which induce me to dissent in this case from the conclusions of the majority of the court. I, however, reserve the right of doing so hereafter. I do not believe that under pretext of mere disciplinary power such as is necessarily and properly lodged in the courts for their own protection and efficiency, the sheriff, a constitutional officer, elected by the people, and whose term of office is fixed in the constitution itself, can be either suspended or removed from office in any other manner than that pointed out by the constitution. I do not think the Legislature could itself exercise such power in any other manner than by address, and it can not confer it on other officers. I concur fully in the general sentiments of the opinion prepared by Mr. Justice DeBlanc as the organ of the court. Such a record of official misconduct could only have come to us as the outgrowth of the disordered condition of things in this State under usurping governments too feeble and too little respected to enforce authority.

Happily, we are now emerging from that unfortunate condition and may again look for the restoration and preservation of law and order through the aid of courts sustained by an energetic executive and a supporting public sentiment. There is, in my opinion, no longer excuse or occasion for such legislation as that invoked in this case. Every judge has the power independent of it, to punish the officers of his court for contempt of his authority or disobedience of his mandates. This may

State ex rel. Vaughan vs. Richmond, Sheriff.

be repeated as often as occasion may require, and once assurance is felt that this power will be exercised whenever necessary, its exercise will seldom become necessary. Meanwhile the business of court need not stop, as in case of inability of the sheriff to act, the law provides another officer, the coroner, to act in his stead, and, indeed, the sheriff's deputies might act none the less while he himself is undergoing punishment for contempt. This disciplinary power was always found sufficient, during the many years of normal government of the State, to the enforcement of all proper authority. In my opinion it will be found now to be so again without a resort to the extraordinary legislation relied upon in this case, neither the origin nor probable objects of which can be commended. However richly deserved, I do not think the suspension of the defendant was authorized by the constitution.

No provision is made in that instrument for the *suspension* of sheriffs at all. They may, however, be addressed out of office. The suspension in the present case was a practical removal by the mere order of the judge. When specific modes of proceeding are provided by law, especially in a matter so important, they must be strictly pursued.

This I understand to have been the uniform current of the decisions of this court.

No. 708.

SUCCESSION OF C. L. B. BOFFENSCHEN.

An opponent of an administrator's account can contest no item of the account which he has not in specific, or in general terms, opposed.

The law of this State prohibiting an individual from doing business under a *firm* name, does not affect a person residing in another State.

To maintain his privilege on property sold by him, as to third persons, the vendor must record the sale.

The proceeds of a policy of life assurance taken out by the husband in favor of his wife, does not become a part of the community, but belongs exclusively to her and her heirs.

A PPEAL from the Parish Court of Ouachita parish. *Slack, J.*

Cobb & Gunby, Franklin Garrett, and Robert J. Caldwell, for opponents.

R. W. & R. Richardson, for administratrix.

The opinion of the court was delivered by

MANNING, C. J. Charles Boffenschen died intestate in March 1876 leaving a widow and six minor children. His widow was appointed administratrix of his succession, and after inventory had been made, she

29	711
46	1106
29	711
46	247
46	1222
29	711
47	901
29	711
48	780
29	711
50	1039
29	711
109	365

obtained an order of sale to pay debts. Part of the movables were sold for cash in June of same year. The other movables and a lot with brick building (offered at first sale and appraisal not having been bid) were sold on twelve months credit in July. In the next month the other real estate was sold, and on the 26th of that month, the administratrix filed her final account and tableau of distribution, charging herself with sum total of sales as cash, less \$23.20, a bid that was not paid, but taking care to charge herself with \$5.25 of the same bid subsequently realized. The assets are proposed to be distributed among the privilege and mortgage creditors, and are nearly consumed by them. The ordinary creditors oppose on various grounds.

Many items are opposed in oral argument and brief which are not specifically mentioned in the oppositions, nor is there a general clause in them under which the intention to oppose such items might be included. The representative of a succession is bound to prove each separate item of his account whether opposed or not. The opponent is a defendant or respondent. His opposition is an answer. If it does not contain a general clause indicating opposition to the whole account, (which may be assimilated to the plea of the general issue) the opponent will be confined in his contestation to those items specifically mentioned.

One of the opponents excuses the absence of specific objections, alleging that the administratrix made no tableau shewing who were creditors, or how she had converted the property into money, or by what authority she had paid debts, but had merely furnished a balance sheet, debiting herself with so much cash on the one side, and crediting herself with the sums paid or proposed to be paid to creditors on the other. This allegation is not sustained by an examination of the account.

It has been a widely-adopted practice in this State to file what the profession have called a tableau of debts i. e. a statement of the name, amount, and rank of all the admitted claims against the succession, preparatory to and in advance of their payment. The Code of Practice nowhere seems to require it, but such tableau serves many useful purposes. That Code does require that persons holding claims against successions shall present them to their representatives for recognition, who shall write that recognition upon the back of the claim or on an annexed paper. Arts. 984—7. This was done in this case. The opponents are recognized as creditors. The tableau that the Codes require is one of Distribution (C. P. arts. 988. 993. Civil Code, arts. 1168 et seq. new no. 1180 et seq.) which differs from an account technically in this, that such tableau is a statement of the manner in which the representative of the succession proposes to distribute the funds in hand, shewing what claims either of privilege, mortgage, or ordinary kind he is prepared to pay with their rank, while an account is what its name imports, i. e. a

Succession of Bofenschen.

statement of the moneyed assets which the representative has received, debited to himself, and on the opposite side, a similar statement of the moneys he has actually paid out, credited to himself. It is in short an exhibit of his gestion so far as it has gone, and such account is intended by the law to be filed annually, and when it is a final account, the gestion is completed. When therefore a creditor alleges that he has not been paid, and complains that he has not been placed on an administrator's account and opposes it therefor, the allegation of non-payment contains within itself the reason why he has not been placed on the account. It is because he has not been paid that he was not placed on the account, since that shews only the amounts which the administrator has *paid*.

In the present case, the account shews the moneys received from sales, giving date and amount of each separately, so that the correctness of each item may be at once verified by examination of the *proces-verbaux* thereof, and on the other and opposite side is a statement or list of the claims paid, or *proposed to be paid*, to the officers of Court, for burial expenses etc., taxes, privileges, mortgages, commissions, each in its order, shewing a balance of \$25.35 for distribution among the ordinary creditors.

A specific opposition, so far from being impracticable, was easy to be made, e. g. the taxes due the State, and those due the town of Monroe, are both placed under the head of privileges separately, and any opponent can perceive the rank assigned them, amount, the year payable, etc.

The opponents claim that the administratrix should be charged with \$43.65 for inventoried property not sold, but do not specify what articles are meant. They also insist that she should be charged with \$17.95 the difference between the bid which was unpaid, and the sum that she collected from the delinquent bidder afterwards. She acted discreetly in receiving the small sum on the bid rather than burthen the succession with the expense of a re-advertisement of the articles which were appraised originally at \$23.20. It appears she *neglected to sell* the 'sign' of the deceased, hung over his door or attached to the store, and which was appraised at \$1.50. She has been charged with this sum.

If there were no graver matters than these complained of touching proceedings that are exceptionally regular in form, and pains-taking in accuracy, we should have little trouble in disposing of them, but the rank and priority of mortgage is involved, and also the right of the creditors to include the life insurance Policy of deceased among his succession effects.

D. F. Conover & Co. holds a note of deceased secured by mortgage upon a lot with brick store upon it, which was recorded October 28th, 1875. Thos. N. Conner holds a judgment against the deceased upon a claim for building the store, in which his privilege as contractor, builder.

and furnisher of materials is recognised, dating from 29th. Nov. 1869, and which privilege had been recorded on that day. He also holds a note for materials furnished in repairing the store, which had been recorded July 21st. 1875. Conner's two privileges have precedence therefore over Conover's mortgage upon the proceeds of sale of that property, and the administratrix thus ranked them.

Conover & Co. claim also a privilege as vendor upon the jewelry which formed part of the stock of deceased. The note which is secured by mortgage is the same that was given for the jewelry, it is alleged, but it is not so expressed, and if it had been, it was not recorded. Recording a mortgage upon the brick store and lot cannot be considered a preservation of a privilege upon a lot of jewelry, nowhere expressed either in the note or mortgage. Nothing was of record to connect the jewelry with the note, and the creditor permitted it to be sold with a mass of other movables.

One of the opponents contests the right of Conover & Co. to appear in court to claim anything, because David F. Conover is the only person who composes that firm. It is sufficient answer to this to say that David F. Conover resides in Philadelphia, and does business there under the style of D. F. Conover & Co., and the prohibitory law invoked by opponent does not assume to control the assumption of such business name outside of the jurisdiction of this State.

The mortgages of Younge and others were paid out of the fund arising from the sale of the property specially mortgaged to them except \$127.59 which was properly ranked as an ordinary claim. The rent demanded of the widow for four months occupation of the marital domicile was properly rejected under every aspect. Civil Code, art. 2391 new no. 2422.

The deceased had insured his life for four thousand dollars in favor of his wife and children. The widow collected the amount of the Policy, and did not include it among the effects of the succession when she filed her account. The opponents allege that the sum thus received by her belongs to the succession—that the premiums paid by the husband on this policy were from the community fund, and the amount of the policy when collected must belong to the same fund—that the husband cannot transfer or donate to the wife community property to the prejudice of the creditors of the community—and if she acquired it by the *stipulation pour autrui*, it is null because forbidden.

The point has been twice before this court. In Hearing's case (26 Annual 326.) there was an alleged separation of property between the spouses, but in that of Clark (27 Annual 269.) as in this, there was a community of acquets. The facts of this last case present the decision in bolder relief than is likely to again occur. Clark and his wife died on

Succession of Bofenschen.

same day. His death was a few hours before hers. The husband or in other words, the community owed rent for the house in which himself and his wife lived. He had but little property, not enough to pay his rent. He had insured his life in his wife's behalf. His lessor, unable to realize the rent from his scanty effects, sought to make this life-policy answerable for it. It was held that the money derived from his policy belonged to his wife's succession, and it was decreed to her legatees. The objections made by the opponents in the present case are the same as those considered in these cases, and pronounced untenable. The policy on the decedent's life issued to his wife for the benefit of herself and children. The premiums were paid by the husband out of community funds, over which he had control as head and master thereof. The most that could be claimed would be the reimbursement of the premiums to the community, but we do not think that claim well founded.

The parish court amended the account by increasing the balance for distribution among the ordinary creditors by a small sum.

It is ordered, adjudged, and decreed that the judgment of the lower court is affirmed the costs of appeal to be paid by opponents.

No. 698.

THE STATE VS. JOSEPH COLBERT.

The admission by the plaintiff that an absent witness of defendant would, if present, swear to certain facts, will not debar the plaintiff from disproving the facts. What a witness has deposed in a previous examination, in the same case, is admissible to rebut his testimony.

In a criminal case the judge may, even after the evidence is closed, reopen the case at any time before the argument begins.

The juries in criminal cases, as a rule, should not be permitted to take with them to their places of consultation any part of the evidence that may be in writing. They must rely on their recollection of the evidence.

A PPEAL from the Eleventh Judicial District Court, parish of Union, Trimble, J.

Robert J. Vaughn, District Attorney, for the State.

J. S. Young, for defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. The defendant was indicted, tried and convicted of the larceny of a hog and sentenced to two years in the penitentiary.

Before trial he filed an affidavit for continuance on account of the absence of one Joe Mays and two other witnesses, whose testimony he swore was material, stating the facts he expected to prove by them.

The district attorney admitted that the witnesses named, if present,

29	715
47	837
29	715
43	773
49	1694
29	715
51	106

would swear to the facts stated. The defendant thereupon announced his readiness for trial, without requiring the State to admit the truth of the facts stated in the affidavit, as he might have done.

For the purposes of the trial, therefore, the three absent witnesses were to be considered as having been put upon the stand, and as having testified as stated in the affidavit which was accordingly read to the jury by the defendant's counsel as part of his evidence.

The district attorney thereupon offered the testimony of said Joe Mays, taken contradictorily with the accused, on the preliminary examination, and also the testimony of one Hudson, in rebuttal, and as impeaching the statements of the witnesses as sworn to by the accused and admitted by the State. This evidence on part of the State was admitted by the court after the district attorney had announced that he had closed. To this evidence the accused by his counsel objected—

First—That the statement of the testimony of the absent witnesses as given in the affidavit can not be contradicted.

Second—That after announcing that the testimony was closed, the district attorney could not offer further evidence.

Third—That the testimony taken before the committing magistrate was not admissible unless the witness was dead or absent from the State, which was not shown.

In answer to the first and third objections, it suffices to say that the *statements of the affidavit were, for the purposes of the trial, taken and considered as the evidence of the absent witnesses, and therefore could be contradicted or discredited in precisely the same ways that their testimony, if actually given, could be.*

One of the modes of discrediting a witness is by showing that he had sworn differently on a previous examination; and this fact would be best proved by the record of that examination. If the objection had been that the State had not laid the foundation for its admission by asking the witness if he had ever previously sworn differently, it would have been perhaps good, but that objection was not made, and we can not supply it.

As to the second objection, it was a matter to be left to the sound discretion of the judge, whether he would, after the State announced that it had closed, and *before argument began*, allow further evidence. We see no reason to suppose the judge abused this discretionary power in this case.

The counsel of accused further asked the judge to permit the jury, on retiring to consider their verdict, to take with them his affidavit aforesaid, stating the facts that it was admitted the absent witnesses would swear to. The judge, we think, properly refused. The affidavit had been read to the jury, and constituted only part of the evidence submit-

State vs. Colbert.

ted to them. The evidence in criminal cases is to a great extent oral, and never reduced to writing. It would not be proper to give the jury part of the evidence. They must rely upon their memory; and it is not the practice in criminal cases to allow the jury to take written evidence offered with them to the jury room. Cases might arise when the judge *in his discretion* would permit it to be done, as where it was necessary for a jury to compare handwriting or other similar instances, but the present case does not fall within the classes referred to.

Judgment affirmed with costs.

DISSENTING OPINION.

EGAN, J. I dissent from so much of the opinion read by Mr. Justice Spencer, as the organ of the court, as sustains the ruling of the court below in admitting, against the objection of the counsel for the accused, the deposition of a witness taken on the commitment trial to contradict the admissions made by the counsel for the State embodied in the affidavit of the accused. I think this was error. The State by making the admission induced the accused to go to trial on the faith and assumption that the statements of fact in the affidavit should be taken as the evidence of the witness and contained no basis for the subsequent introduction of evidence of different statements at another time, the right to inquire into which had, I think, been waived by the State by the admission of the affidavit. As independent evidence, the deposition was liable to the objections made. It must be supposed to have influenced the verdict. The court should not have allowed the case to be reopened to receive this evidence, and could not control its effect. A new trial should be ordered.

No. 695.

THE STATE VS. TOD JOHNSON.

A question put to a witness in a criminal proceeding which suggests the answer, is not the less leading because propounded in the alternative.
A verdict of guilty on the offense charged, when a different offense only has been proved, should be set aside by the court *a qua*.
If the description of stolen property, in an indictment, is too general, it may, by permission of the court, be amended.

A PPEAL from the Fifth Judicial District Court, parish of East Feliciana. *McVea, J.* Trial by jury.

J. H. Lamon, District Attorney, for the State.

W. F. Kernan, for defendant and appellant.

The opinion of the court was delivered by

EGAN, J. The defendant was tried, convicted, and sentenced to fifteen

29	717
45	1328
29	717
49	311
29	717
120	344

months imprisonment at hard labor in the penitentiary, upon the charge of larceny of "an animal of the cow kind." After an ineffectual motion for new trial, and an equally ineffectual motion in arrest of judgment he has appealed.

The first ground of error assigned is that the court permitted the district attorney to ask one Guy, his own witness, and not shown to be hostile to him or the prosecution, or reluctant to give evidence, the leading question, "did or did not accused acknowledge to you that he had marked the calf?" the said question being leading and suggestive of the answer. We think this was error, and the fact that the question was put in the alternative form does not remove the objection. Such form of question was not allowable at common law; nor here, under the statute which adopts the common-law rules of evidence in criminal proceedings. 1 Greenleaf, 5434 Phillip's Ev. vol. 2, p. 888; same page, 888, n. 572.

The propriety of this rule is the more manifest because the question asked appears from the record to have elicited the principal, if not the only, evidence on which the accused was convicted, and that, too, in the shape of admissions made to a witness under such circumstances that the fact could not be contradicted.

The second ground of error assigned is that the court erred in refusing a new trial, because the only offense proved against the accused was that of "marking a calf," which does not constitute larceny.

That such is the law is beyond question, and a bill of exceptions in the record makes it almost certain that altering the mark of a calf, the property of another, which is of itself a substantive and distinct offense, was the extent of that proved against the accused. But whether so or not, that fact was elicited improperly, as we have seen, under the first head, and we must suppose that it materially influenced, if it did not altogether induce, the verdict of the jury.

The third ground of error is that the information is bad, for not specifying the particular animal of the cow kind charged to have been stolen. It is certainly very loose pleading to charge simply the larceny of an animal of the cow kind, and is too uncertain to be encouraged. This was, however, one of those things which, under section 1047 of the Revised Statutes, the court might have permitted to be amended, it being, in the language of the statute, "the name or description of a thing named or described" in the information. While, however, we are not disposed to encourage so loose pleadings, we are not prepared to arrest the judgment for a matter which might have been, and may yet, under leave of the court, be amended under the view we have taken of the case otherwise. It may be as well, however, to remark, that this information is loosely drawn, and we recommend, in the public interest, more careful pleadings in such matters in future.

State vs. Johnson.

For the reasons assigned, it is ordered, adjudged, and decreed that the verdict and sentence appealed from be annulled, avoided, and set aside, and that this case be and it is hereby remanded to the court below, to be proceeded with according to law and the principles herein announced.

No. 557.

JOHN T. LUDELING VS. MARY H. FELTON AND HUSBAND.

A discharge in bankruptcy, like prescription, does not expunge, but merely bars the recovery of debts, and if not specially pleaded, will not be noticed. Neither a decree of separation of property, nor her husband's discharge in bankruptcy, will relieve the widow from liability for one half the community debts, should she accept the community. The widow who sells a part of the community property for her own benefit, thereby accepts the community. The liability of the widow for her share of community debts is prescribed in ten years from her acceptance of the community.

APPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J.*

C. T. Dun, for plaintiff and appellant.

Todd & Brigham, for defendant.

The opinion of the court was delivered by

SPENCER, J. This suit is against the defendant to make her liable for the debt of her former husband, James G. Felton, upon the ground alleged that she had accepted the community which it was stated existed between her and Felton at the time of his death, by using and disposing of the community property.

The answer contained in substance:

First—A general denial.

Second—An allegation that previous to Felton's death, defendant had obtained against him, in 1869, a judgment separating them in property and dissolving the community.

Third—That Felton became a bankrupt in 1868 and surrendered what little property he had in bankruptcy. And that at his death he left no estate whatever.

Fourth—It was alleged that no legal judgment was ever rendered against Felton in favor of plaintiff as alleged. That after his surrender he was never legally represented in the proceedings.

Fifth—That after Felton's death, she had made a declaration before the recorder showing the above facts in regard to Felton leaving no estate and no property, and the previous dissolution of the community,

29	719
47	659
29	719
109	174
109	180
29	719
110	862
110	870

with a view of relieving herself of any suspicion of having accepted the community, or of there being any community to accept.

Sixth—She denies that she was in any manner liable for the debt sued for, or for any of Felton's debts.

Seventh—She pleaded against the demand the prescription of one, three and five years.

Counsel on both sides have lengthily and exhaustively discussed the second and third grounds of defense; but under the view we have taken of this case, we do not consider either ground as materially affecting its conclusion and decision.

A surrender in bankruptcy does not operate, or have the effect of, a payment. Payment extinguishes absolutely the obligation, both morally and legally. Bankruptcy is simply a bar to the enforcement of it. If bankruptcy extinguished a debt, then when the principal obligor thereof took its benefit, the surety of that debt would be discharged. In other words, the very contingency (to wit: insolvency of the debtor) which necessitates and occasions suretyship would extinguish it. The discharge or bar resulting from bankruptcy not extinguishing the debt, but leaving the natural and moral obligation to pay in all its force, it follows that unless pleaded in defense by the debtor it is waived; and that a judgment rendered against a bankrupt who does not plead his discharge in bar of the action, is just as valid as a judgment against a debtor on a prescribed debt, where prescription is not pleaded.

We see no reason therefore to doubt the validity of plaintiff's judgment against James G. Felton.

Nor do we understand or see the force of defendant's argument as to the effect of the bankruptcy of James G. Felton on the wife's liability for community debts, if she be held to be a partner. If she accepted the community either expressly or tacitly, *his* discharge would not protect *her* from pursuit for *her half of the debt*. As we have seen a discharge in bankruptcy is not a payment. When her husband went into bankruptcy, the debts of the community were not thereby paid or extinguished: and if afterward, by the happening of the necessary conditions, to wit: dissolution of the community and its acceptance by her, her liability for those debts became absolute, *she* could not plead *his* discharge in bar of an action *against her*; no more than could one joint or solidary debtor, plead the bankruptcy of his co-debtor. So we see it is matter of no moment in this case whether James G. Felton went into bankruptcy and was discharged or not, if it is true as alleged by plaintiff that his debt was a community debt—that on the dissolution of that community, whether by death or judgment, defendant accepted it.

Nor is it material to the decision of this cause, whether the community between Felton and the defendant, was dissolved by a judgment or by death.

The important question is, *after it was dissolved, did she accept it, either expressly or tacitly?* Happily we are all agreed that in one or the other way, it was dissolved. We are equally agreed that the acceptance may be express or tacit—by words, or by deeds only—and that having accepted in either way, the wife is liable for one half of the community debts.

The only difference between the cases where the dissolution is by death, and where it is by judgment, is that in the former the wife is presumed to accept unless she renounces, and in the latter, she is “supposed” to renounce unless she accepts. But the effect is the same in both cases, when she has accepted. See C. C. 2410, 2413, 2414, 2415—2420—12 An. 77, 13 An. 470.

That the wife has the right and power to accept the community when it is dissolved by judgment, is clearly and explicitly shown by article 2430 of the Civil Code, and that that acceptance may be express or tacit is equally indisputable. See cases above cited. If therefore it is shown that plaintiff's debt is one of the community, and if defendant has accepted expressly or tacitly, she is certainly liable to pay one half of it, unless barred by prescription.

There is no pretense that she ever expressly accepted the community, but it is urged that she did so tacitly, by taking possession of its effects and disposing of them for her own benefit. There was a mass of testimony taken on this question, and it would be impracticable for us even to attempt its recapitulation. We have read and considered it with care, and must say that, (aside from the legal presumption that the effects found in the possession of the parties at its dissolution belong to the community) the proof satisfies us that there were at least four or five mules and perhaps other effects belonging to the community, and that the defendant sold and disposed of them for her own benefit. This act was a tacit acceptance and notwithstanding any “supposed” renunciation resulting from her silence after judgment of separation, “makes her liable as a partner.” 12 An. 77; 13 An. 470; C. C. 2418.

But her liability as a partner is only for *one half* of the debts. True she would be responsible to the administrator or heirs of her husband for the amount of the value of his half of the community effects so disposed of by her. But in this case there is no proof in the record which enables us to determine that value. We do not agree to the proposition that we can take judicial cognizance of such values. Besides if the crops of 1870 be held to have been community, it is shown that it was absorbed by the expenses of making it and perhaps other privileged claims against the community may have been paid by the widow. Besides we are not prepared to say that a mere creditor of the estate of the husband, can recover in such a demand—because she only owes the amount.

Ludeling vs. Mary H. Felton and Husband.

of the value of the husband's share of the common effects. She owes that to the estate of her husband and not to any particular creditor thereof.

The plea of prescription of one three and five years interposed by the defendant can not be sustained. She accepted the community in 1871 and this suit was brought in 1874. Her obligation to pay half of the debts of the community flows from a quasi contract, from an *assumpsit* implied by law from her act of acceptance. The prescription applicable to such an action is that of ten years. C. C. 3544.

It is therefore ordered adjudged and decreed that the judgment appealed from be avoided and reversed, and it is now ordered and decreed that John T. Ludeling have and recover of the defendant Mary H. Felton, four hundred and sixty dollars with five per cent interest thereon from first of January, 1868, and costs of both courts.

No. 617.

SARAH L. LAY ET AL. VS. SUCCESSION OF ELIAS O'NEIL.

The homologation of a tutor's accounts, even when had contradictorily with the under-tutor, is not conclusive on minors, who may, after majority, contest the accounts.

The citation of an heir, by the tutor, to oppose an account rendered by the tutor after the heir is of age, puts at issue *all* of the accounts rendered by the tutor while the heir was a minor, and the latter must then and there oppose all of those previous accounts, or be concluded by them.

Pending the existence of a civil war, any government that may arise capable of enforcing obedience, within certain territorial limits, is entitled to exact it, and no person, under the sway of such government, can be prejudiced in any manner for yielding it obedience.

A tutor who has done all, in the management of a minor's property, that a prudent administrator could do, can not be held for more than the revenues actually yielded by the property, and the actual proceeds of its sale.

A PPEAL from the Parish Court of Bossier parish. *Fort, J.*

J. D. Watkins, for plaintiffs and appellees.

Land & Taylor and *J. A. Snider*, for defendant.

The opinion of the court was delivered by

MANNING, C. J. Isaac Lay died in Bossier parish in 1859, leaving an estate and several minor children. Elias O'Neill was appointed administrator of the succession, and satisfactorily closed his administration by final account, duly homologated August 4, 1860. He was then appointed tutor to the minors, and between that date and his death in

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April 1871, he filed eight accounts of his tutorship. His widow is his executrix, and is defendant in this suit.

About six months after his death, the children of whom he had been tutor sued his succession to recover one hundred and thirty thousand dollars, due them for alleged maladministration. That suit was before the District court of Bossier parish, and on appeal in 1873, our predecessors dismissed it on a plea to the jurisdiction. *Lay v. O'Neill*, 25 Annual, 608.

They then instituted suit in the Parish court of Bossier for one hundred and four thousand dollars, in currency and about twenty-six thousand dollars in gold, and in 1875 on appeal, that suit was dismissed by sustaining an exception to the form of the action. 27 Annual, 643.

In the autumn of that year the present suit was commenced, alleging the tutorship, the maladministration, the rendition of eight accounts and the objections to them, the death of the tutor, the qualification of his widow as executrix, and praying that she be ordered to render an account to the plaintiffs of her testator's tutorship of them. The order was made, and she obeyed it.

The defendant, complying with this order, made the eighth annual accounts a part of her answer, and averred that the fifth of them included and recapitulated the balances embraced in the first four, and that it was homologated contradictorily with Elizabeth Lay, one of the plaintiffs, and her husband Joseph Robertson, as well as with the under tutor of the other heirs on 15th. of June 1866. After the rendition and homologation of the sixth and seventh accounts contradictorily with the under tutor, the same process was gone through with the eighth on Oct. 14, 1869, and contradictorily with Sara Lay and her husband, Boykin. The defendant pleads these judgments as *res adjudicata*, and that under art. 149 of the present constitution, they are conclusive against all parties to them upon all matters embraced in them, and finally pleads prescription to the action.

The plaintiffs, four in number, viz the two above mentioned, and Nancy, who became Mrs. Swann in October 1869, and Franklin, all opposed the account, and the matter now before us is the Account, rendered for O'Neal's tutorship, and the Opposition thereto. The various objections set forth in the opposition will appear as we proceed.

The first account of the tutorship was filed in May 1861, shewing a balance due the tutor of \$6118.85. He gives the reason for this in his petition accompanying that account. "There was a large debt due the minor heirs of Benjamin Lay which was about to be sued on, and which had it been done, would have been ruinous to them, and knowing which and having money of his own and feeling great personal interest in the welfare of his wards, he advanced the money for the payment of the

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same." The verity of this declaration is nowhere impugned. After citation to the under tutor, this account was homologated Aug. 3 1861.

The 2d account, after citation, was homologated March 7, 1863.

3d account was filed, and publication made thereof April 6 1864

4th account was filed and published April 29 1865

5th account was homologated June 15 1866

6th account was homologated June 6 1868

7th and 8th accounts were homologated Oct. 14 1869

No attempt appears to have been made to take any order on the 3d and 4th accounts, except for publication of the notice that they were filed, and no explanation of that omission is needed when the respective dates of their filing is observed. The 5th. account is a resumé of all that preceded it, and includes also the additional receipts and disbursements since the last, and shews a balance in favor of the minors of \$5,347.63. By this time one of the heirs, Elizabeth, had married, and both herself and husband, as well as the under tutor to the other heirs, were cited personally. On July 12, 1867 this heir executed a receipt to O'Neill her former tutor in full of all moneys and balances due her on account of his administration as tutor, and her husband Robertson signed the receipt with her.

The 6th. 7th and 8th accounts are presented by O'Neill as the tutor of the three other heirs (Mrs. Robertson having no interest in the fund to be accounted for) and though the last two accounts were homologated on same day, the 7th. was filed and published June 16 1868, and the 8th. on Sept. 9 1869. Before this last date, Sara had become Mrs. Boykin, and she and her husband were cited personally as well as the under tutor of the remaining two minors.

After the 5th account had been homologated, the property was sold to effect a partition in December 1866, and on the 31st of that month, Mrs. Robertson received six thousand three hundred and seventy nine dollars and 62 cents in gold as her share of the proceeds of that sale.

Between March 5th. 1869 and March 21, 1871 Mrs. Boykin was paid seven thousand four hundred and fifty-four 48-100 dollars, which was in excess of the sum shewn to be due her. Separate accounts had been kept with each heir after the 5th.

Nancy or Addy Lay, as she is called in different parts of the pleadings had married W. M. Swann, and between Dec. 8 1867 and March 21, 1871 had received four thousand two hundred and forty five 95-100 in gold, and three thousand four hundred and fifty eight 07-100 in U. S. currency, and this is in excess of her share according to the account.

Franklin Lay had received two thousand and ninety nine 02-100 dollars after the filing of the 8th. account, which was nearly the balance due him as stated thereon. His share of the proceeds of the sale of Dec.

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1866 is not included in this, nor commissions of tutor. A summarized statement in figures will be clearer than the recital.

TUTOR IN ACCOUNT WITH FRANKLIN LAY.

Dr.	To-bal. due on 8th. account.....	\$2,377.65
	" share of sale of 1866	6,385.52
		<hr/> \$8,763.17
Cr.	By payments	\$2,099.02
	" coms. thereon.....	209.90
	" assets delivered to new tutor.....	2,741.49
		<hr/> \$5,050.41
	apparent sum due Franklin Lay.....	\$3,712.76
	The sum overpaid Mrs. Boykin is.....	\$3721.07
	and that overpaid Mrs. Swann is.....	444.89
		<hr/> \$4,165.96

and as this is larger than the sum apparently due their brother, the counsel for the O'Neil succession ask us to deduct the one from the other, and thus relieve the tutor's estate.

The plea of prescription to the action of the Lay heirs is not good. It is argued that the 'action against the tutor respecting the acts of the tutorship' means technically a suit for an account, like the present, which was not instituted until more than four years after the two eldest had attained majority, and hence as to them it was prescribed. The suit first instituted was against the tutor, respecting the acts of the tutorship. It alleged an indebtedness resulting from his tutorship, and was such a demand as prevented the acquisition of prescription. It was followed by the second which renewed the demand. Service of process in these two suits brings the heirs within the time when they may have their action against their tutor.

The judgments, homologating the several annual accounts, are provisional merely, and do not conclude the minor, who has a certain time after the termination of his pupillage to object to them, even though his under tutor may have been cited and appeared for him. *Stafford v. Villain*, 10 La. 329. *Bry v. Dowell*, 1 Rob. 111. *Succession of Tucker*, 13 Annual, 464. But after the pupillage is terminated, and the heir is cited, he is bound to take notice of the account to which the citation refers, and of all others previously filed to which that is a pendant, and to object to it and oppose its homologation, under penalty of being concluded by the judgment. The plea of *res judicata*, opposed by the executrix in this case, so far as it is based upon the judgments upon the annual accounts after citation of the under tutor, can not be maintained. But

some of these accounts were final as to some of the heirs. As each one attained majority or married, and was cited, and settled with, the judgment thus rendered may not only be pleaded as the thing adjudged, but the settlement or payments made under the judgment may well be pleaded in bar of any future action. Yet more. It is questionable whether the heir can be permitted to file an opposition to the final account of his tutor, with whom he has settled the affairs of the tutorship, and to whom he has given a receipt and acquittance, before he has attacked the tutor by a direct action to annul his receipt. *Haydel v. Poursel*, 1 Annual, 38. *Kellar v. O'Neal*, 13 Annual 472.

The opponents repudiate the payments to each of them after the rendition of the accounts, and after each one, successively marrying, had been cited, and take shelter under art. 355 of the Code (art. 361 of the Revisal), which annuls agreements between tutors and pupils unless entered into after rendering a full account &c., which must be made to appear by the receipt of the pupil ten days previous thereto. It would be a reproach, if the Code furnished a shelter to those who seek to do an injustice by repudiating payments made to them in discharge of their tutor's liability. And that this article was not thus intended, has been long ago ruled by this court, even when the liability of the tutor was discharged, not by the payment of money, but by the delivery of property, its equivalent in value. *Chapman's Case*, 13 Annual, 228.

Great reliance is placed by the counsel for the tutor's succession on the effect of art. 149 of the constitution of 1868. They contend that under it, the judgments of homologation rendered between January 1861 and 1868 are valid and final, and they argue on the basis or theory, that judgments rendered during the late war between the States, in a locality that was under the sway and subject to the jurisdiction of the Confederate States, would not have been valid without 'an act of grace,' such as that Article of the present constitution.

This is not the theory that pervades the juridical history of the world. Every country that has suffered the calamity of intestine strife, and that has witnessed one portion of its subjects or citizens armed in hostile array to another, has acted upon the theory, that a government was entitled to obedience if it had the power to enforce it, and judicial tribunals have uniformly acted upon and applied this principle. As merely an abstract proposition it is so wise, and its application practically to human affairs has been found so salutary, that it is not to be supposed the framers of the constitution of 1868 were unmindful of its existence, or that they intended art. 149 to be more than a recognition of a rule that the experience of mankind, illumined by the gleam of centuries, has found necessary for its peace.

In the fifteenth century, and within so small a territorial area as Eng-

land, two hostile governments disputed with varying success for supremacy, and acquired or lost the possession of tracts of country with frequent alternations. During these wars of the Roses each government enforced the obedience of the inhabitants under its territorial sway, and they who rendered such obedience, whether it was enforced or voluntary, were not held to suffer for it. Blackstone thus exhibits the practical necessity for this doctrine, and its early recognition. "When therefore an usurper is in possession, the subject is excused and justified in obeying and giving him assistance: otherwise, under an usurpation, no man could be safe: if the lawful prince had a right to hang him for obedience to the powers in being, as the usurper would certainly do for disobedience." Comm. Book 4 marg. 78.

Nor are there wanting decisions of the highest court of our own country upon the extent of temporary sovereignty. In 1814 the port of Castine was captured by the British forces, and remained under their command and control until after the ratification of the treaty of peace. During this period, the British government exercised all civil and military authority over the place, and established a customhouse, and goods were imported under regulations prescribed by itself. Some of these remained at Castine until after it was evacuated by the enemy, and upon the reestablishment of the American government, the collector claimed a right to American duties on the goods. The court say—by the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over the place. The sovereignty of the United States over the territory was of course suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender, the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognise and impose. From the nature of the case, no other laws could be obligatory upon them, for where there is no protection, or allegiance, or sovereignty, there can be no claim to obedience. Castine was therefore during this period, so far as respected our revenue laws, to be deemed a foreign port, and goods imported into it by the inhabitants, were subject to such duties only as the British government chose to require. Such goods were, in no correct sense, imported into the United States. *U. S. vs. Rice*, 4 Wheaton 246.

The judgments of homologation of these accounts have the force and effect that any other judgment upon a like account rendered before 1861, would have and no more. The art. 149 does not impart to them the quality of finality and irrevocability, as supposed by the counsel for the

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accountant, but they are governed by the same laws and the same adjudications that regulate all accounts of a tutor with his pupil.

Mrs. Robertson's receipts to her tutor after the fifth account, which was a final account as to her, and which was homologated after personal citation of herself and her husband, bind her, and discharge the tutor from any further claim of hers growing out of the tutorship. The judgment upon the eighth account, which was final as to Mrs. Boykin and Mrs. Swan, is equally conclusive as to their pretensions, and their over payment entails upon them the liability to refund.

We should not have to proceed further but that Franklin Lay did not attain majority until Nov. 3, 1874, after the death of his tutor O'Neil. The several accounts of his tutor are therefore open to his attack. The grounds alleged for opposition are elaborate and manifold. We shall be able to review only the most important, but have considered all.

The close of the war revealed an unprecedented situation. O'Neil had in charge the plantation of his wards, and had been so fortunate or so discreet that he had preserved their team, and implements of husbandry, and had corn and pork sufficient to last through the year. He convoked a family meeting to take advice, and it advised that he should hire laborers and work the plantation at the expense of the minors. O'Neill's special occupation or calling had been that of overseer. The family meeting recommended that O'Neill should live on the plantation, and give his personal attention to its cultivation, and should receive one fourth of the products for his services. He had suggested in his petition of convocation that the property should be leased, but it appears the relatives and friends of the minors who composed the council had great confidence in O'Neill's management, and desired to ensure his own personal services. O'Neill would not accede to their request. He could not control the labor necessary for successful planting. The freedmen were prejudiced against him, and were averse from entering into engagements with him. He leased the property to one Carter for the year 1866.

That year opened upon a people, who had been stunned and dazed by the sudden and sweeping subversion of their whole system of labor, but who by a reaction as sudden and complete, had become buoyant and jubilant over the rich reward that was in immediate prospect for the agriculturist. O'Neill took advantage of the opportunity. His contract with Carter was eminently advantageous to the minors. He stipulated that Carter was to furnish labor, and to pay for it, and they were to divide the gross crops equally.

It was a disastrous year. The floods came, and landlord and tenant and laborer were engulfed in a common ruin. The Lay plantation was almost an exception. There were two hundred and forty-five acres in the tract. The crop of 1866 was seventy-five bales of cotton and about

five hundred bushels of corn. O'Neill took half, and sold the cotton for gold, and paid it to the heirs. He was unwilling to try more experiments. The property was sold in December of that year under an order of court for partition, and the land realized twenty two thousand six hundred and fifty dollars in gold. We have seen that it was distributed equally.

The opponents charge that O'Neill was without authority in all this matter, and that he owes them twelve dollars per acre for the rent of their land for that year, and one dollar per bushel for six thousand bushels of corn, and something more for pork and use of implements, and eleven years of interest upon the whole. They have received the gold for the cotton raised during that year, and credit their tutor with it. Their demand is not just. O'Neill displayed extraordinary prudence and judgment in his management at this critical time, and did all that a 'prudent administrator' could do, and his wards profited by his good management.

Another item is an alleged sale of thirty bales of cotton in 1865 immediately after the close of the war, with the value of which the opponents seek to charge their tutor. O'Neill had credited them with the sale of exactly that number of bales in his 3d account, but they insist they were not sold then (1863) when of course Confederate currency alone could have been obtained, but that his entry on his account was a fraud, and the cotton was in fact retained until 1865, and then sold. O'Neill's account was prepared and filed in court during the war, and at a time when wiser men than he thought that all the cotton in the Confederacy ought to be burned, and stronger men than he, and of more authority, were burning it whenever occasion offered or pretext could be found. It could not have occurred to him to charge himself with the price of thirty bales of cotton in an account that was to go on the records, in the hope or expectation that he would save it, and sell it with profit at that indefinite time in the far future when a treaty of peace should be made between the then contending governments. His act in charging himself with the price of the cotton was unsuspicious both as to time and circumstance. Besides there is no evidence, either reliable or certain, to support the charge of appropriation of money or the charge of fraud. O'Neill's whole conduct as administrator of the property of these heirs falsifies the accusation. He did sell 114 bales of cotton on 12th. August 1865 for nine thousand dollars, and 104 bales on March 10, 1866 for over fifteen thousand dollars, and he has accounted to the heirs for these sums.

Another ground of opposition is that the accounts for the years of the war were in Confederate currency, and that the charges made in them should be scaled, so as to reduce the amount charged against the minors

to their proper value in gold, and to facilitate us in doing this, we have been furnished with a tabulated statement of the value of Confederate currency at Richmond, expressed in gold, as extracted from Appleton's Cyclopædia. The counsel for the opponents does not rely on art. 127 of the constitution, which is inapplicable to the matters in issue here, nor upon the reported cases in this State immediately succeeding the war, which we do not regard as precedents, wherein a doctrine was maintained which the Supreme Court of the United States has since pronounced erroneous. *Thorington v. Smith*, 8 Wallace, 1.

In establishing liability, as between parties circumstanced as these were, a variety of considerations intervene. Prices not only nominally large but really so had to be paid for food and clothing of minors, while their own revenue was in the main cut off. The scarcity of food and clothing of itself caused an increase in price, so that the large prices paid then were not entirely due to the depreciation of the currency. A bottle of quinine, which cost one hundred and twenty dollars, is one of the items objected to. Of course the small value of the currency was one of the causes of this cost, but if the quinine at this moment in the State were instantly destroyed except a few bottles, the appreciation in price of those few bottles would be very considerable.

So again, the parish judge has stricken out of every one of these accounts of the war period, the excess of expenditures over receipts, on the general principle that a tutor cannot expend for a minor more than his revenues, which is quite true as a general rule. But he lost sight of the fact, that the reason why the revenues were so inconsiderable was, that the tutor was husbanding the cotton he was raising during these years, and saving it to produce a revenue on a grander scale thereafter. He sold some cotton during the war, as he was obliged to have some money, but he saved 218 bales and sold them for over twenty-four thousand dollars. Part of them were raised during these years when the revenues are inconsiderable, and equitably belong to those years. If he had sold the cotton each year as he raised it, the complaint would be that the minors' property was exchanged for valueless paper, but he would at least have got enough money to reimburse his expenditures. He preferred in the interests of the minors to wait, and they have been largely benefitted by his action.

This opinion would be extended much beyond its present length, were we to examine in detail the whole of the grounds of opposition. We do not think they are sufficient to entitle the opponents to a revision of the accounts. The three daughters of the deceased have no ground of complaint whatever. Elizabeth was paid in full, and Sara and Nancy were overpaid. We should give O'Neill's executrix a judgment against each of them for the sum overpaid if there were a prayer to that effect in the

pleadings, but we find none except in the brief of counsel. We shall reserve the rights of O'Neill's succession in that respect.

We have already stated the *apparent* sum due Franklin Lay, but it is not certain that the tutor's succession is not entitled to a reduction of that sum, in so far as the commissions of the tutor are unpaid. The calculations point to a probable deduction of \$1725.85, but we are not prepared so to adjudge, nor can we grant the prayer of the executrix to relieve the succession by crediting it with all that was paid to all the heirs indifferently, and thus decree the youngest to have been paid through his sisters. O'Neill was tutor to each one of the heirs. He should have paid to each only that which was her due. Having paid more to some than were their shares, he would be entitled to reimbursement from them of the overplus if he had asked it, but he must still pay to the youngest what is justly his, and to ascertain how much that is, the claim of Franklin Lay as set forth in this suit will not be concluded but must be ascertained, in accordance with the views expressed in this opinion upon the various matters discussed and decided therein.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court is avoided and reversed, and that there be judgment in favor of the executrix of Elias O'Neill's succession against Mary Elizabeth Robertson, and Sara L. Boykin, and Nancy A. Swann upon their demands, and that the right of the executrix of that succession to pursue the two last named for the sums overpaid to them is reserved. It is further ordered and decreed that there be judgment in favor of the executrix of Elias O'Neill against John Franklin Lay as in case of non-suit, and that she, as executrix recover of the opponents the costs of both courts.

Allison vs. Thomas and Rosenfeld.

No. 645.

HUGH ALLISON, LIQUIDATOR, VS. FRANK THOMAS, ADMINISTRATOR, AND L.
ROSENFELD.

Where a surety has alleged in his defense, a new and exonerating contract, made subsequent to the one declared on by the plaintiff, any fact in proof of the new contract, is admissible in evidence.

A confession of judgment by a principal, has on the surety, only the force of a private agreement between the principal and his creditor.

Even after a judgment against the principal, any agreement made with him by the creditor, without the assent of the surety, which defers payment, or in any wise impairs the recourse of the surety against the principal, will discharge the surety.

Orders of court should and must be executed—not at the risk and peril of the officer charged with their execution, but at the risk and peril of those who dare disregard or resist those orders.

A PPEAL from the Twelfth Judicial District Court, parish of Franklin. *Taliaferro, J.*

Wells & Corkern, for plaintiff and appellee.

Morrison & Farmer, for defendants.

The opinion of the court was delivered by

DEBLANC, J. As receiver and liquidator of the late firm of Hugh Allison & Co., plaintiff claims from defendants, the sum of six hundred and fifty dollars, with interest thereon at the rate of eight per cent per annum from the seventh of December 1869. His action is based on a bond furnished by one Van Thomas as principal, and Leopold Rosenfeld as his security, to release some cotton and corn sequestered from said Van Thomas, to satisfy the price of supplies advanced to him by the aforesaid firm.

That the writ of sequestration was properly granted, there can be no doubt: Thomas was certainly indebted to the firm of Hugh Allison & Co., for supplies furnished him by the latter, to enable him to carry on his plantation during the years 1869 and 1870. The evidence of that debt was duly recorded, and, in violation of the law and his contract, Van Thomas was attempting to part with and dispose of the crop of 1869, with the view of defeating his furnishers' privilege, when they applied for and obtained an order of sequestration, commanding the seizure of said crop.

The writ of sequestration was placed in the hands of the sheriff of the parish of Franklin. He proceeded to execute it, but the only evidence that he did, is the defendant's judicial admission that his cotton and corn were sequestered. That admission is contradicted by the sheriff's return; for, in that return, he states that, after the seizure, the cotton, which never was in his possession, was moved in his presence and against his will, by threat and force. We hope that this return is the last of that

description which shall be made in our State. Orders of court should and must be executed, not at the risk and peril of the officer charged with their execution, but at the risk and peril of those who dare disregard or resist those orders.

The condition of the bond of release is that, "if the said Van Thomas, or his surety, the said Leopold Rosenfeld, shall well and truly deliver unto the sheriff of the parish of Franklin, or his successor in office, the corn and cotton sequestered by said sheriff, when ordered to do so by the court, then the bond to be void—otherwise to remain in force. That bond was given on the twenty-ninth of January, 1870, and it was declared forfeited, and transferred to the plaintiff on the second of December 1873.

The cotton and corn passed, or rather remained in the possession of Van Thomas and Rosenfeld. The latter disposed of the cotton and of the proceeds of its sale. Their object was accomplished: they had substituted, in lieu of the sequestered property, one of those bonds intended as a protection to both, the debtor and the creditor, and which, now, is a danger to the creditor; a bond which, in the correct estimation of plaintiff's counsel, is always given with the invariable intention of violating its condition, and of doing the very reverse of what the parties bound themselves not to do.

It is manifest that, at the date it was subscribed, the bond sued upon was, in substance and in form, a valid bond, and that, shortly after its execution, it could have been enforced. Has it ceased to be valid? Can it still be enforced? If not, since when and for what cause?

On the sixth of September 1870, Van Thomas moved that plaintiffs' sequestration be dissolved: his motion was tried and overruled, and, on the eleventh of March 1871, he confessed, in favor of said plaintiffs, a judgment acknowledging their claim and their privilege on the sequestered property. By the terms of that judgment, the acknowledged claim was to be paid in four instalments maturing respectively on the ninth day of June, September and December 1871 and March 1872. The confession made by the debtor and the delay granted by the creditor were the result of a compromise, and constituted, as to said delay, a new contract, one to which Rosenfeld was not a party and to which it does not appear that he gave his consent.

Whatever it was, that compromise suspended the creditor's action from March 1871 until November 1872. Van Thomas died, and, at the last mentioned date, the firm of Hugh Allison & Co. brought suit on the sequestration bond, against the succession of said Thomas and Leopold Rosenfeld. The proceedings in that suit were mislaid and a subsequent action filed against said parties, by Hugh Allison, as liquidator of the aforesaid firm. In that action, he alleges that the succession of Van Thomas is insolvent.

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Rosenfeld alone appeared in court, and, in his answer, he contends that he never was legally bound as the surety of Van Thomas, and that if he was, he has been released by the compromise already referred to and entered into between said deceased and the firm of Hugh Allison & Co. On the trial of this case, he offered to prove, by one of plaintiff's witnesses, that the consideration of Thomas' confession of judgment was that, as they became due, his (Thomas') warrants for his salary as parish judge, would be received by his creditors, in payment of their claim against him. The evidence of that fact was rejected by the lower court, on the grounds that it is irrelevant, and that the surety could not be heard to set up defects and irregularities in the judgment.

To the ruling of the court defendant excepted.

The evidence sought to be elicited was proper and legal. It tended to show the existence of a subsequent agreement between Van Thomas and the firm of Hugh Allison & Co. The terms and the mode of payment were changed: the creditors had agreed to receive, in payment of their claim, the warrants of the parish judge, and, if established, that fact, as the delay allowed to the debtor, discharged the surety.

It is urged that a judgment had been rendered against the principal, and that the surety could not be heard to set up its defects and irregularities. This, we imagine, was not the object which defendant had in view. He was merely striving to prove that, for the confession of that judgment and the prolongation of time, there had been a consideration, and what it was. This, he had the right to do.

As to the surety, the confession of judgment by his principal, was but the evidence and had but the value of a private agreement between the principal and his creditors, made executory by their will and consent, and not, as in other cases, by exclusively the decree of the court.

[It has been correctly held, and we adhere to that conclusion, that, though by judgment the surety becomes absolutely bound for the debt of his principal, the creditor can do no act by which the rights or recourse of said surety against the debtor may be destroyed or impaired: if he does, he releases the surety in the same manner as if no judgment had been obtained.] 3 R. R. 299.

[In law, what was the time fixed for the return of the released property, for a compliance with the obligation of the bond? Was it, could it have been one year after the rendition of the judgment recognizing the creditor's claim, the creditor's privilege? Assuredly not. That term could not, legally, extend beyond the space of time within which a judgment could have been obtained and executed.]

Instead of that, the confessed judgment itself was made payable in four distinct instalments, and one after the other the four fractions of that judgment matured, without any action on the part of the creditors.

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After the delays first agreed upon, three additional delays were granted to the principal on the bond, from June 1871 to March 1872.

Were the excluded evidence before us, had defendant been allowed to prove that there was a settlement between Thomas and the plaintiff, to what irresistible conclusion would that evidence lead? That, when the creditors of Thomas ascertained that the cotton had been shipped and was out of reach, that his recognized privilege was no longer an available security, that he was left with but an action on one of those bonds which so often impeded the course of justice and the enforcement of the most legitimate rights, he exchanged the hope of recovering by that expensive action for the promise to be paid in warrants.

[Plaintiff has alleged, but has failed to prove the insolvency of the principal on the bond. If he died insolvent, when did he become insolvent? Was it before, during or after the extension of time granted by the creditor? If it was during and after the extension, when it would have been either premature or too late for any successful action on the part of the surety, the latter's liability was discharged.]

In his treatise on obligations, Pothier maintained that "when the creditor accords the debtor a prorogation of time, this does not prevent the surety from acting against the debtor, and providing for his indemnity, if he perceives that the fortune of the debtor is beginning to diminish." Until 1825, this was the legislation in our State. Since then, what is the law?

"The prolongation of the terms granted to the principal debtor without the consent of the surety, operates a discharge of the latter." R. C. C, 3063.

Pending the discussion on this amendment to the Code of 1808, the juriconsults submitted to the Legislature the following remarks:]

"Notwithstanding the respect due to an authority of such weight as Pothier, we do not think that his doctrine is in accordance with general principles, as applicable to matters of suretyship, nor that it is just to drive the surety to the recourse he indicates. The obligation which the surety contracts is to pay at the time fixed by the contract, if the debtor himself does not. This security is given for a limited time. When the time for performing the obligation arrives, the surety should have the right of insisting on the execution of the contract, that he may be discharged, or at least that he may be informed of the amount which he has to pay. To prolong his obligation beyond the term fixed, is to force him beyond his undertaking, to subject him to conditions to which he did not mean to submit. In form, it is changing his contract.

Twenty-four years ago, commenting on a case more doubtful than that submitted to our consideration, this court said: "If defendant had paid the whole of plaintiff's claim, and demanded a subrogation of his rights,

plaintiff could not have given it. By his agreement, which was a prolongation of time granted to the principal debtor, without the consent of the surety, he was estopped from present suit. Then, the co-surety's right under the contract had been changed, to the co-surety's detriment, by the act of the creditor; and, therefore, the co-surety's liability was discharged. 8 An. 75-6.

In this case, the prolongation of the term was not a mere indulgence on the part of the creditors: it is evidenced by the confessed judgment, and it was the result of an agreement which suspended the execution of said judgment, the enforcement of the claim against the debtor or his surety, and which, necessarily, not only suspended, but absolutely precluded, during the allowed delay, any payment by the surety and his subrogation to the creditor's rights.

Under these circumstances, we conclude:

1. That a new contract may have been, and, probably, was entered into between plaintiff and defendant, as to the mode of satisfying the claim of the former against the latter.

2. That, even if there was no such contract between them, a prolongation of term was granted to the debtor by the creditor, without the consent of the surety.

3. That the confession of judgment by the debtor, the division of the claim into four instalments, and the delays fixed for the maturity of each of the instalments, justify the presumption that said judgment was a final settlement between the creditor and debtor.

4. That, when the agreement took place between Van Thomas and the plaintiff, they were aware that the cotton had been shipped, the condition of the release bond violated, and that, by said agreement, the confession of judgment and the extension of time allowed and accepted, Thomas' creditors tacitly renounced to their recourse on the bond and against the surety.

It is therefore ordered, adjudged and decreed that the judgment appealed from be and it is hereby annulled, avoided and reversed.

It is further ordered, adjudged and decreed that plaintiff's demand against Leopold Rosenfeld be and the same is hereby rejected, and that the costs of this appeal and of the lower court be paid by said plaintiff.

Rehearing refused.

 Mary C. Flournoy and Husband vs. Alonzo Flournoy.

No. 758.

 MARY C. FLOURNOY AND HUSBAND VS. ALONZO FLOURNOY, EXECUTOR, AND
 OTHERS.

The heirs of a succession which has not been opened, and which is composed entirely of claims against another succession under administration in a parish court, sue the executor and heirs of the latter succession, (of which they are co-heirs,) for a partition and settlement of both successions, and to compel each heir of the latter succession to collate \$5000.

Held—That the claim for collation is virtually a demand for a money judgment, and being for more than \$500, the parish court has not jurisdiction.

If the surviving husband did not open his wife's succession, of which he enjoyed the usufruct, the assets of her succession may be distributed by the probate court, in the administration of the husband's succession, when his heirs are her heirs, and the heirs of the one, set up no demand against the heirs of the other succession, involving more than \$500.

An exception to the jurisdiction of a court should not be referred to the merits, but passed on at once.

A PPEAL from the Parish Court of Caddo parish. *Cresswell, J.*

Land & Taylor, for plaintiff and appellant.

Duncan & Moncure, for executor and appellee.

A. W. O. Hicks, for J. C. Yerger, defendant and appellant.

The opinion of the court was delivered by

MARR, J. Dr. Alfred Flournoy, residing in the State of Tennessee, married Martha Moore, who died, leaving six children, of whom three, Alonzo, James, and Alfred are living, and William, Rachel, and Martha are dead. William and Rachel left a number of children, some of them minors; and Martha, who married Cain, left one child that survived her but a few months.

In 1836 Dr. Flournoy contracted a second marriage with Maria, widow of Yerger, who had one child, John C. Yerger, who is still living.

At the time of the marriage Dr. Flournoy owned from thirty to thirty-five slaves, and was considered a wealthy farmer in Tennessee; and Maria Yerger owned some slaves, nine or ten, as some of the witnesses say, twelve or fourteen according to others; and other personal property of no great value; all of which Dr. Flournoy reduced into possession.

In 1837 Dr. Flournoy visited Louisiana in search of a new home, "prospecting," as the witnesses say. He found lands that suited him in Caddo parish, government lands occupied by settlers, or "squatters," to whom he paid \$2500, for their improvements and claims.

Early in 1838, with two of his sons, he left Tennessee, for Louisiana, leaving the remainder of the family in Tennessee. He brought with him the greater part of his slaves, as well those which belonged to him before as those which belonged to Maria Yerger at the time of the mar-

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riage; also, a supply of corn and meat, mules, horses, and farming implements; laden on flatboats, which, at an expense of \$1400, he had towed to Shreveport. Proceeding thence, he reached his destination on the thirtieth of March, 1838; and established himself on the lands for which he had paid the occupants when he visited Louisiana in 1837.

In the fall of 1838, the family moved from Tennessee, and continued to live on this property. In 1839 Dr. Flournoy entered the lands, at government price, \$1 25 per acre.

Mrs. Flournoy died in February, 1848, leaving four children, issue of her marriage with Dr. Flournoy, Mary Camp, Pattie, David, and Charles Flournoy. David died several years after his mother; and Mary Camp, now wife of S. H. Sibley, Pattie, wife of S. B. Surrat, and Charles Flournoy are still living.

When Dr. Flournoy removed to Louisiana, the law of Louisiana began to operate upon him, his rights, and his property within the limits of the State; and a community of acquets and gains between him and his wife ensued by mere effect of law, dating from the removal to Louisiana. As Mrs. Flournoy died intestate, her share of the community was inherited by her children, in equal parts, that is, by the four Flournoy children and by John C. Yerger.

By the act of 1844, in force at the death of Mrs. Flournoy, and now, Dr. Flournoy was entitled to the usufruct, for life or during widowhood, of that portion of the community which was inherited by the issue of the marriage. That is, four fifths; the other fifth being inherited by John C. Yerger, whose title and right of possession and enjoyment accrued and took effect immediately upon the death of his mother.

Dr. Flournoy took no steps to administer the succession of his wife. He assumed and acted upon the hypothesis that his four children were the only heirs of their mother; and these children have acted upon that assumption, and have claimed and held adversely, and without regard to any right or title of Yerger.

To avoid errors in future, with regard to this property, it may be well to state here what were the rights of Dr. Flournoy and his wife Maria, at the moment the laws of Louisiana began to operate on them. It has been suggested in argument that we must presume that the law of Tennessee was like our own, in 1836, when the marriage between these parties took place. But we know that it was not; and, while we can not be expected to know, and do not profess to know the details and particulars of the special statutes of any other State than our own, we can not pretend to be ignorant of the general laws of the several States, regulating marriage, descent, and the transmission or acquisition of property. As a matter of legal history, we know that, in 1836, slaves were personal property in Tennessee; that community did not exist between husband

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and wife; and that the slaves and other personal property belonging to a woman became the absolute property of her husband when reduced into possession by him after the marriage.

When Dr. Flournoy arrived in Louisiana with these slaves, they fell under the dominion of the laws of Louisiana, in the exact condition in which they were on arriving here; and being then the property of Dr. Flournoy they continued to be his property. They never entered into the community. Mrs. Flournoy had no property in them; and the results of their labor alone belonged to the community. The community consisted of the profits, gains, realized from the removal to Louisiana, in 1838, up to the time of the death of Mrs. Flournoy, in February, 1848; and nothing is counted as profits or gains except such property or effects as remain at the dissolution of the community.

With respect to the land, it may as well be stated that the \$2500, paid by Dr. Flournoy to the occupants, and the price paid the government, should properly be charged to the community, and refunded to the succession of Dr. Flournoy, as so much advanced by him out of his own separate means, for account and benefit of the community.

In 1852 Dr. Flournoy qualified as natural tutor of his four minor children, Mary Camp, Pattie, Charles, and David, to whom their maternal grandmother had bequeathed some money and slaves. As tutor, he received this bequest from the executor in Tennessee; and brought the property to Louisiana.

David died a minor, without issue; and Mary Camp and her husband, Sibley, provoked a partition of the slaves and money in the hands of her father and tutor, Dr. Flournoy. She proceeded, and the partition was made, on the hypothesis that she, Pattie, and Charles were alone entitled. The partition was made in December, 1860; and the whole bequest, valued at \$8354 50, was divided among the three just named, each receiving one third.

This was wrong. When David died his father was his heir for one fourth; and his brother and sisters of the whole blood, and his brothers and sisters of the half blood, including John C. Yerger, the son of his mother, were his heirs, in unequal portions, according to the dispositions of the Civil Code.

In September, 1858, Dr. Flournoy sold the homestead, the community lands, to Ogilvie for \$8400. In 1861 he desired to settle the community; and for that purpose he filed his petition, stating that he had advanced the money with which the lands sold to Ogilvie were purchased and paid for; and he made the necessary prayer to have effected the partition and settlement. But the condition of affairs then existing, and the civil war which ensued, no doubt, prevented further proceedings on this petition.

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In August, 1865, the heirs of Maria Flournoy being all of age, Mary Camp Sibley and her husband, Pattie Surrat and her husband, and Charles Flournoy, by notarial act, ratified the sale made by their father to Ogilvie in 1858, and received their shares of the price, \$8400, on the hypothesis that they were sole heirs of their mother and entitled to her entire interest in the community; and that her share of the price of the lands was one half, or \$4200.

This was wrong again. David and John C. Yerger were equal heirs of their mother with them. Dr. Flournoy was entitled to have refunded to him the \$2500 he had paid for the improvements and claims of the squatters; and he was entitled to one fourth of David's share. The remaining three fourths should have been divided between the full brother and sisters of David and his half brothers and sisters, including John C. Yerger, as fixed by the Civil Code.

Dr. Flournoy died in 1873; and his succession consisted of movable effects estimated at \$9600 12, and real estate valued at \$5700; in all \$15,300 12.

In December, 1874, Mary Camp Flournoy and her husband, Samuel H. Sibley, brought this suit in the parish court of Caddo against Alonzo Flournoy, executor of the last will and testament of his father, and the other children and descendants of Dr. Flournoy, as well by his first as by his second marriage, and against John C. Yerger, as one of the heirs of Maria Flournoy. In the petition it is alleged that Dr. Flournoy advanced to each of his children by the first marriage and to Charles five thousand dollars in excess of their portions; and that they are bound to collate. The prayer is for a settlement and partition of the successions of Maria Flournoy and Dr. Alfred Flournoy; and that all the children of the first marriage and Charles Flournoy be ordered to collate the advances made to them by the deceased.

The executor and the heirs thus called upon to collate excepted to the jurisdiction of the court on the grounds substantially:

First—That the succession of Maria Flournoy has not been opened, and is not pending in the parish court of Caddo.

Second—That this suit is, in point of fact, a proceeding to render the succession and heirs of Dr. Alfred Flournoy liable to the succession and heirs of Maria Flournoy for a pecuniary demand.

It is obvious that after the lapse of more than twenty-six years since the death of Mrs. Flournoy, that is from February, 1848, to December, 1874, none of the movable effects or slaves, if there were any, belonging to the community would remain. The usufructuary could not be liable to his children, the heirs and owners, for such of these effects as perished by age, natural decay, or otherwise, without fault on his part. The maxim *res perit domino* applies as well to the property and effects of

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the heirs in the hands of the legal usufructuary as to that in the possession of the owner. Time and use would have left no trace of horses and mules or plows and farming implements; and the law with its potent voice struck down slavery and destroyed property in slaves. If there were slaves belonging to the community, that is slaves acquired after the removal of the family to Louisiana, they ceased to exist as property; the usufructuary lost the use and enjoyment; the owners lost the property. Dr. Flournoy would not have been liable, or rather his succession would not have been liable, to his children, heirs of Maria Flournoy, for such effects of the community as perished in the using or ceased to be property by the effect of the law during his usufruct; and as it is manifest that none of these effects remained in kind in his possession at the time of his death, if there is any liability to the heirs of his wife it resolves itself, necessarily, into an obligation to pay money; and the demand of the heirs of the wife is a demand against the succession and heirs of the husband, for a sum of money due the succession of the wife.

The succession of Maria Yerger consists wholly of claims against the succession and heirs of the husband; and the amount of that indebtedness, as alleged in the petition, is far beyond any possible value of the property and effects of the succession of the husband.

Before there can be any tangible succession of Maria Flournoy, any thing to be divided among her heirs, a judgment must be obtained against the executor and heirs of the husband, not merely the children of the first marriage, fixing the amount; because it is not admitted by the executor nor by the heirs that any such indebtedness exists. That only could be recovered which might be proved to be the amount due by the succession and heirs of the husband to the succession and heirs of the wife; and the amount demanded in the petition is far beyond the limited jurisdiction of the parish court.

Where the husband, survivor of the community, dies without having administered the succession of the wife, of which he had the usufruct, his heirs being also the heirs of his wife, the two successions may be settled and distributed among the heirs in his succession alone in the parish court, as was decided in Peniston's case, 22 An. But where one succession, or the heirs of one succession, seek to recover of another succession, or the heirs of another succession, money or property, the suit must be brought in the court having jurisdiction of the amount in controversy, and it can not be in the parish court where the amount or value exceeds five hundred dollars, as was decided in Bynum's case, 24 An.

In this case we have a complication of heirship:

First—The children of the first marriage, entitled to a share in the

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succession of Maria Flournoy only in virtue of their inheritance from their half-brother David.

Second—The children of the second marriage, entitled to a share in both successions, as heirs of their father and their mother.

Third—John C. Yerger, entitled to a share in the succession of his mother as one of her heirs, and to a share in both successions as one of the heirs of his half-brother David.*

These conflicting rights and interests can not be settled in the parish court, nor in any single proceeding in the matter of the succession of Dr. Alfred Flournoy; and the parish judge properly declined to entertain jurisdiction.

We observe in this case that the exceptions to the jurisdiction were referred to the merits. We consider this bad practice. When a plea to the jurisdiction is filed, the question should be passed upon and determined by the court at once. It is to be regretted that the parties in this case have incurred the expense and delay of this protracted litigation, to be told at last that the court is without jurisdiction. We should be glad if it were in our power to put an end, by final decree, to this controversy; but we can only affirm the judgment of the court below.

We think it proper to say that all the rights of the parties, whatever they may have been, at the inception of this suit, remain as they were then, wholly unaffected by this decree.

It is therefore ordered, adjudged, and decreed that the judgment of the court below be affirmed with costs.

Mr. Justice Egan, having been of counsel, takes no part in this decision.

Rehearing refused.

*This is manifestly a mistake, since David died before his father. The paragraph should have been written thus:

"John C. Yerger, entitled to a share in his mother's succession, as one of her heirs, and to a share as one of the heirs of his half-brother David."

The statement was made *arguendo* to show the complication of the heirship, not to determine the respective rights of the heirs; and this correction, which the context requires, can not affect the conclusion and decree.—R. H. MARR.

Succession of Harris.

No. 716.

SUCCESSION OF JOHN M. HARRIS. OPPOSITION OF J. F. PARGOUD.

29	743
51	1307
29	743
124	758

An administrator who sells succession property, without an order of court, for less than its appraised value, is responsible for the difference.

An administrator is liable for any loss of, or damage to succession property, caused by the fault of his agent, or by any want of prudent administration.

Public administrators are authorized to employ lawyers in behalf of the successions they administer.

In a small succession, five per cent on the amount of the inventory is a reasonable allowance for attorney's fees.

Until it be shown that there are absent heirs, not represented, no attorney should be appointed to represent them.

The fees of attorneys for absent heirs, unless their services are proved to have been valuable to the succession, must be paid out of the shares of the heirs they represent.

The charges of notaries, and other officials, in succession matters, are fixed by law, and must be rigidly adhered to.

A PPEAL from the Parish Court, parish of Ouachita. *Slack, J.*

W. W. Farmer and Robert J. Caldwell, for administrator and appellant.

Cobb & Gunby, for opponent.

The opinion of the court was delivered by

EGAN, J. James S. Ray, public administrator of Ouachita, was appointed, by virtue of his office, dative testamentary executor of the will of the decedent in January, 1874, J. F. Pargoud, the executor named in the will, having refused to accept.

The dative executor provoked the sale of both real and personal property and filed the account, the items of which are opposed generally and specially by Pargoud as a creditor of the succession. The accountant excepted that he was not a creditor and not entitled to oppose. A tableau of debts in the record shows a large accepted claim in his favor, which had been transferred to Meyer as collateral security for a debt of smaller amount due him by Pargoud, which was subsequently paid. Three thousand dollars of the Pargoud debt was used by Meyer in paying for real estate of the Harris succession purchased by him, and the remainder is still due and belongs to Pargoud as shown by the evidence.

It is the fact and not the amount of indebtedness to him which gives him the right to oppose. It is therefore immaterial to inquire further or to prove specific amount. The exception was properly overruled.

We shall consider the opposition in the same order as the parish judge.

First—That the accountant has credited himself with the difference between the proceeds of sale of property and the amount of inventory

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improperly for several reasons: First—That he has not accounted for a mule, Julie, appraised at \$175. This is admitted, but it is claimed that this mule was bid off at the sale, and the purchaser not complying with the terms of sale, the mule was subsequently sold privately by the executor for \$110 cash, instead of on a credit of twelve months as ordered by the court. The accountant has failed to show at what price the mule was bid off, or that its real value was less than the appraisal, and, if so, how much less. He was therefore properly charged with the appraised price, \$175.

The next item charged to be improperly credited and not accounted for is nineteen hundred pounds of meat. The quantity inventoried was twenty-five hundred pounds and that sold only six hundred pounds. The parish judge allowed the executor a credit of 280 pounds of meat consumed by the colored family of deceased, according to the best estimate of the witnesses. This allowance is not complained of by the opponent, and we think was proper. The executor was, however, charged with the difference between 880 pounds, the quantity sold and thus used, and that inventoried, making 1620 pounds, at ten cents, equal to \$162. Of this the executor complains on the ground that he has shown by witnesses that something over five hundred pounds was stolen from the smoke-house at night in the absence of Hanna, a keeper appointed and paid by him to care for the property; and for the further reason that the meat was not weighed, but only estimated at the time of the inventory. With regard to the latter reason, it may be remarked that the mode of estimation adopted is a not uncommon one where, as in this instance, the meat was hanging on sticks; that is, the quantity on one stick was weighed, and then the number of sticks and of pieces upon each counted and the total quantity thus calculated. This may not have been exactly accurate, but was, no doubt, approximately so. At all events, at this distance of time, we have no better guide, and if there is any uncertainty it is attributable to the executor, who provoked the inventory and permitted it to be taken in this manner. It was his duty to have had an accurate inventory, and if he did not do so he can claim no advantage of that fact now. There may, however, have been some shrinkage or loss in weight in the short time between inventory and sale, and we will reduce this item of charge against accountant to five hundred pounds, at ten cents, equal to one hundred and fifty dollars on that account. We do not think that the executor is entitled to the credit for the meat shown to have been stolen. His keeper boarded and slept two or three miles from the place, and, as properly remarked by the parish judge, his presence and care were more needed at night than at any other time. No prudent man would have left his own property exposed to such risk, and the executor must be held responsible for the fault or

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neglect of his servant, the keeper, appointed by him, and whose keepership appears to have been of little if any service to the succession.

The next item was corn inventoried and not accounted for. The evidence in regard to this is not very satisfactory, but taken in connection with the inventory might have justified some charge against the executor on this account; as it renders it probable that some part of the corn was stolen, and it certainly was left as liable to be stolen as the meat. It is shown, however, to have been in great part inferior to that which was on the top when inventoried, and was not so accurately measured or estimated. We think the parish judge was liberal in not charging any thing to the executor on this account, but as the evidence does not enable us to ascertain with how much he should be charged we shall not disturb the judgment in this respect.

The next item of \$25 35 money embraced in the inventory, not charged in the account, is admitted to be correctly charged in the judgment of the parish court.

The matter of two or three barrels of spoiled meat was properly not charged against the executor.

The item of twenty dollars for a rifle gun stolen was properly charged for the same reason as the meat; i. e., the fault of the keeper.

The next item opposed is the attorney's fees in the succession, charged at \$581 62, or ten per cent on the amount of the inventory. It is objected that this is not only excessive, but that the public administrator is a public officer with a compensation fixed by law at double that allowed ordinary administrators, and that he is presumed to have been appointed by reason of his qualification to discharge the duties in person without the aid of an attorney, and if he requires one that he must himself pay for it as was no doubt contemplated by the Legislature in allowing so large fees of office. In view of the history of this and other recent legislation in Louisiana, and of the class of persons usually chosen to act as public administrators, and of the fact that no special qualifications were required by the law, it would be a violent presumption that any such economic or prudent considerations entered into the legislative mind. This was properly characterized in argument as only one of the many more than useless officers with which our people have been burdened in the recent past, but for the future happily no longer under the new order of things. Nevertheless, the office was created by statute of the body acting as a Legislature. No man could properly or safely perform its duties without the aid of an attorney, and the law itself permitted the judge of probates to allow, besides the regular commissions, other reasonable and proper expenses. We think attorney's fees was one, and that the parish judge properly allowed the amount of five per cent on the inventory, or one half of that charged

Succession of Harris.

in the account, which, considering the size of the estate and the value of the services required for its proper management, we consider a usual and proper allowance. The attorney may be entitled to more and even to the full amount charged as against the executor personally for services rendered for his protection. The amount allowed is, however, all that the succession should pay. In this connection we will say that the whole amount of twenty-five dollars, charged as a fee for attorney of absent heirs, should have been disallowed instead of being reduced to ten dollars as was done by the parish judge. The appointment of an attorney for absent heirs in this case was not only unnecessary, but was an abuse and a burden improperly sought to be imposed upon the estate. There is no evidence of the existence of any absent heirs, but on the contrary the instituted heirs resided in the State and parish, and the executor claimed and was allowed credit for amounts expended for the benefit of the family of the deceased, who resided in the place where he died. The appointment of attorney for absent heirs is not authorized without proof of the fact which renders it proper. 12 L. 73. It is proper only when the heirs or part of them are absent from and unrepresented in the State. 15 L. 527. When no absent heirs are shown to exist the appointment of an attorney to them will be revoked as illegal. 3 An. 226. We have felt it proper to announce the law on this subject because this has been a fruitful source of illegal charge upon estates in Louisiana, and the sooner it ceases to be the better.

It may not be amiss to remark that the fee of attorney for absent heirs, when such appointment is necessary, is properly chargeable to the portions of the absent heirs and not to the body of the succession; where, however, the services of that officer *have proved valuable to the succession and for that reason* a fee has been sometimes allowed the attorney for absent heirs out of the succession funds generally. The law, however, does not contemplate this, and it is exceptional.

The executor credits himself with \$178 50 as having been paid to his brother-in-law, Hanna, as keeper. This was properly disallowed by the parish judge. The evidence of Hanna himself proves that no such amount was paid him, and it is also apparent that the succession was not benefited by such keepership as it received at his hands. To allow it would be to give a bonus for neglect and carelessness. The executor seems to have put himself to but little trouble personally about this succession. When he did do so he has charged for it liberally outside of his commissions, in the item of \$46 50 for expenses. We will allow him ten dollars on this item as a compensation to hands for assisting in collecting and delivering personal property sold. The parish judge rejected the whole of this item, and except as to the sum named, to wit: ten dollars, we affirm his judgment in this respect.

Succession of Harris.

We do not think that a stranger to a succession who assumes its administration for profit is entitled to charge against it the small amounts expended for buggy-hire and ferriage in attending to the ordinary duties of the office he has assumed.

There are two other minor items which have attracted our attention in examining the record, and which were overlooked by the parish judge. The first is the account of J. J. Butler, J. P., for affixing the seals to the effects of decedent, the sole service rendered by him, and whose account includes horse-hire, per diem, and mileage to the residence and then to Monroe to return the *procès verbal* and the sum of six dollars for affixing the seals. We know of no warrant of law for the payment of such an account by the executor, and there appears to have been nothing in the small succession of an illiterate man to make the affixing of the seals indispensable. The law fixes the charge for this duty at two dollars, and we allow this amount. If the officer chose to amuse himself by riding to Monroe to return the *procès verbal*, he could not charge the succession with it.

The second of the items is an account for thirty dollars paid the recorder for raising the seals and taking inventory. By the latest fee-bill no allowance is made for removing the seals, but by the Revised Statutes of 1870 the sum of one dollar is allowed for that service and for writing the *procès verbal*, and this amount we will allow instead of four dollars as charged in the account. The law makes no provision for the payment of buggy-hire and ferriage, for which six dollars is charged in the notary's account, and we can make none. The law allows fifty cents per hour, not exceeding twelve hours per day, for taking inventories out of the notary's office and twenty-five cents per hundred words for the *procès verbal*, with twenty-five cents for the seal and certificate thereon, and twenty-five cents for swearing each appraiser. The time consumed necessarily in taking this inventory could not have exceeded one day, which would be six dollars; swearing two appraisers and seal and certificate seventy-five cents; there are not so many, but we will allow eight hundred words for the *procès verbal* of inventory, which would be one dollar and sixty cents more; making a total of eight dollars and thirty-five cents, or say nine dollars, for inventory, to which add one dollar for raising seals, the cost fixed by law, making a total of ten dollars, which we allow on this item of credit claimed by the executor instead of thirty dollars as charged by him. A charge of a round sum in a notary's account for taking inventory is illegal and should be disallowed by the court. 12 L. 73. It may be said and doubtless will be that this amount is too small, and that the services of officers can not be procured at these rates. To this it may be answered that the law has so fixed them and has made it penal to receive any other or higher rates or charges for such services,

and that the Legislature, though often applied to, has as often refused to increase them. It is not for us to do so, and it may be that our notions have been heretofore too extravagant and officers too exacting. Perhaps, if the effort is made, officers may be able to live here as elsewhere upon the fees allowed them by law.

Unlawful and extravagant charges and expenses in all the details of the management of successions have grown to be an abuse and a reproach in Louisiana. We think it is time that the courts should put a stop to this state of things, so far at least as the law permits, and that the attention of inferior tribunals should be called to this matter, which was always burdensome and unjust, and is especially so now in the impoverished condition of the State and people.

In regard to these particular services the facility with which the appointment of notaries may be procured in every neighborhood would largely diminish any fancied inconvenience resulting from a reduction of fees to the legal standard.

The only remaining matter to be considered on this opposition is the commissions claimed by the public administrator as dative testamentary executor, which were disallowed by the court. There is much in this record of careless administration and consequent loss to the succession to justify the judgment of the parish court in this respect, and we are not prepared to say that on the evidence before us we should disturb it if this were a final account.

We can not pass without rebuke the fact that the administrator has charged, at least in one instance, an amount shown by his own witness and brother-in-law not to have been paid by him; the fact which appears in the record, and though not directly connected with any other item of the present account than the allowance of commissions to the executor—which can not escape remark—that he discounted for cash shortly before maturity paper taken at the sale of succession property, and has shown no order of court or *other excuse or necessity for doing so*; the fact that after an order of court to sell on twelve-months time he sold for cash for \$110, at private sale, a mule appraised at \$175, and has not shown any sufficient reason for not selling this as other property on time according to the order of the judge, in which way it is to be presumed it would have brought much more, and has also not shown that the mule sold for its full value, although for less than the appraisal. These things were certainly not the acts of a prudent man or faithful administrator; and, indeed, the record discloses such manner of dealing with the succession as might well justify the judgment of the court below in rejecting the executor's commissions absolutely. As, however, there is another reason why he would not now be entitled to charge full commissions, that is that the administration is unfinished,

Succession of Harris.

-even if he shall ever be entitled to them, and as we do not wish to do this officer any injustice we will amend the judgment as to this item so as to make it one of nonsuit only. The executor may thus be afforded an opportunity to show some better reason than is disclosed in this record why he shall be entitled to charge in his own favor commissions for administration in the final account which he has been ordered to file.

For the reasons assigned, it is therefore ordered, adjudged, and decreed that the judgment of the parish court be amended so as to conform to the views expressed in this opinion; that there be judgment of nonsuit only as to the item of executor's commissions for administration; that the executor be charged with one hundred and fifty dollars for meat not accounted for instead of one hundred and sixty-two dollars as fixed by the parish court; that the executor be credited with ten dollars on account of the item for expenses of forty-six dollars and fifty cents, which was wholly disallowed by the parish court; that the sum of two dollars be allowed the executor for the account paid J. J. Butler, J. P., for affixing seals instead of twenty-one dollars and thirty cents, as allowed by the parish judge; that the sum of ten dollars be allowed the executor on account paid M. M. Grady, recorder, for raising seals, taking inventory, and swearing appraisers, instead of thirty dollars, as allowed by the parish court; that the item of twenty-five dollars for attorney for absent heirs be altogether rejected instead of being reduced to ten dollars, as was done by the parish court; and that, as thus amended, the judgment of the parish court be in all respects affirmed. It is further ordered that the succession pay the costs of this appeal.

No. 663.

T. B. JORDAN & Co. vs. M. & A. ANDERSON.

When husband and wife are co-defendants in a suit they may be legally served by a citation to each, or to the husband alone.

When husband and wife are co-defendants he sufficiently authorizes her, by appearing in the suit, and aiding her in her defense.

A debt contracted by the wife, or by her husband with her consent, which inures to the benefit of her separate property, is binding on her.

A mere change in the form of a debt does not work a novation.

A party can not introduce evidence inconsistent with his pleadings.

A surety can not benefit by an exception personal to the principal.

A PPEAL from the Tenth Judicial District Court, parish of Caddo.
Looney, J.

J. W. Jones and Land & Taylor, for plaintiffs and appellees.

A. W. O. Hicks, for defendants.

The opinion of the court was delivered by

EGAN, J. The plaintiffs sue upon promissory notes given for the price of materials and workmanship used in constructing a brick building

29	749
104	663
29	749
125	567

upon the property of the wife, one of the defendants, and also claim the privilege accorded by law upon the building. The defendants excepted that they were not properly cited. They were sued solidarily, and citation served upon each personally as it was addressed to each separately. This was good citation and service had they not been husband and wife (C. P. 178, 190), or had the wife been separated from bed and board. C. P. 193.

Code Practice, article 182, provides that if the defendants are husband and wife a single citation and copy of petition are sufficient, and article 192 that if the petition and citation are directed against a married woman not separated from bed and board from her husband the service may be made by delivering to either husband or wife, or at the domicile in the usual way.

The fact that plaintiff did not avail himself of the privilege accorded him by law of giving and serving but one citation to both husband and wife does not make it bad as to her. In this instance the issuance of two citations was proper. The husband was cited, not in that capacity only, but as a co-obligor. The defendant, B. Anderson, was not separated from bed and board from her husband. Had she been, however, the citation and service in this case would have been good, and not having been, it is equally good. Both she and her husband were cited. It was sufficient. They subsequently answered, whereby, it is claimed, defects of citation or service were waived.

It is unnecessary to pass upon the effect of answer in this case "*under protest*," as the parties were legally cited. The wife answered separately, denying all the allegations of plaintiff not specially admitted. She admitted her signature, but set up that she was then and at the time of signing the obligation sued on, the wife of her co-defendant, and that her signatures were obtained without the authority of her husband and without consideration. The husband filed a separate answer, denying all allegations not admitted, admitted his signature as surety for his wife, set up her want of capacity to contract the obligations sued on for the reasons stated in her answer *which he adopted in this respect as his answer*. He further averred that he had received no consideration for the contract, and prayed that plaintiffs' demand be rejected. The answers also claim the payment of fifty dollars on the contracts.

It is objected that the wife was not properly authorized to defend the suit and stand in judgment, because the judge had no power to authorize her unless the husband had *refused*. His appearance and adoption of her answer and assistance in the defense is sufficient authorization, if the judge had made no order of authorization.

The husband claims that his wife is not bound, and that he being sued as her surety is not bound unless his principal is. The law is that.

suretyship can only be given for the performance of valid contracts. A man may, however, become surety for an obligation from which the principal debtor might be discharged by reason of an exception merely personal to him; such as being a minor or a married woman. C. C. 3036; 16 An. 445.

It is urged that, although the plaintiffs' debt is for workmanship and materials for the improvement of the separate property of the wife, the husband had the administration of her property, and the debt is one of the community and not hers. It is true that the presumption of the law both as to debts and acquisitions made during the marriage is that they belong to the community, and hence it is well settled that to recover against a married woman it is necessary to show affirmatively that the consideration inured to her benefit. 15 An. 352; 20 An. 229; 24 An. 95. We know of no law, however, and have been referred to none, which exonerates the wife from the obligation to pay for what does inure to her separate benefit or that of her separate property. The law of Louisiana treats marriage as a kind of partnership, from which, however, is specially reserved the separate property of the spouses. It also permits the wife to retain or at any time to resume the administration of her own separate estate, and she retains as fully as if unmarried the *jus domini* of it. From this it follows that she is clothed with all the incidental powers necessary or advantageous to the enjoyment of her separate property, among which is the right to erect buildings or make other improvements upon her separate lands. If these are paid for out of the community funds the only result is that at the termination of the community she or her separate estate owes to the community the amount so expended. The improvements, however, are none the less her property, and if, as in this instance, they are unpaid for, that price is due directly from the wife to the person making them. That the husband chose to bind himself individually also by no means diminishes or changes the wife's obligations.

It is well settled that buildings and other improvements made during the marriage upon the separate lands of the wife belong to her as to any other owner of the soil, and not to the husband or to the community. The doctrine "*cujus est solum ejus est usque ad celum*," applies to her equally with any other proprietor. The disabilities under which the wife rests under our law are that she can not contract without the authorization of her husband or of the judge, and that she can not bind herself as security or otherwise for a debt of her husband or of the community, and can not alienate her dotal property. Aside from those disabilities, as we have said, she may lawfully contract, as for the benefit and improvement of her own separate property.

In the case at bar she and her husband, who, it seems from the

evidence, she permitted to administer her property, and who, therefore, aside from his marital duty, had a personal interest in the development and improvement of valuable unimproved real estate of the wife in the city of Shreveport, that it might become a source of revenue, besides being enhanced in value otherwise, contracted with the plaintiffs, builders and material men, to erect a brick building upon this property at an agreed price, which was subsequently enhanced to the extent of two hundred dollars for additions to the work. There was a written notarial contract signed by all the parties, the husband signing with the wife. This was sufficient authorization, 17 An. 204; 19 An. 48; 21 An. 396, even were it not otherwise abundantly shown by the evidence in the record that the contract was made and the work done with the express authorization of the husband, who himself superintended the work in the exercise of his administrative power as such. The husband had nothing to serve as a basis of credit, and he was not credited; all the property in their possession belonged to the wife or to her and her minor child by a former marriage with Gilfillan. It is not pretended that the work was not needed or of advantage to her separate estate, and the pretense that she did not authorize it or was not herself authorized is wholly unsupported by the evidence. After the completion of the work the husband and wife signed another instrument which is in evidence in which they acknowledged the completion of the work in compliance with the contract of plaintiffs, and recited the fact that they had the same day given the notes sued on for the unpaid balance of price. This with the other written and parol evidence in the record disposes of the argument that there was a novation of the debt. Novation is never presumed; and so far from having been proved, the evidence in this case shows nothing more than a change in the form of the evidence of the debt. The original debtor contracted no new debt, nor extinguished the old one. No new debtor was substituted for the old one, who was not discharged, and the creditor was the same. C. C. 2189, 2187; 8 M. 431; 9 M. 187; 6 N. S. 568; 16 La. 140; same, 487; 11 An. 547; 14 An. 54; same, 93.

If the wife were incapacitated to make the contract in question, she would not be benefited. Under such circumstances, she could not retain and enjoy the benefit of plaintiffs' labor and materials without paying for them. C. C. 1793; 18 An. 14; 16 An. 217; 23 An. 409. These principles were reviewed and recognized in the unreported case of Wolfe & Cerf vs. Harvin, recently decided by us in New Orleans. Her incapacity, if it existed, would not enable her to commit a fraud. 6 An. 56. That incapacity, as we have seen, is not universal and absolute. In the cases to which it does not extend, the capacity of women is not affected by marriage. 2 An. 1, 10, 433. Her husband's authorization is not required to the acts necessary for the administration of her paraphernal property.

Her right of administration would be a vain thing if she could not without her husband's authority pay debts incurred for her separate property. For such debts she may sign notes or drafts without her husband's authority; *a fortiori* then, with it. 14 An. 676. Had there been any want of original authority, as we have seen there was not, the subsequent execution by the wife and husband of the receipt or instrument reciting the contract and acknowledging its completion and the execution of the notes used or given for its price is sufficient ratification of it to bind her. 4 An. 163; 5 An. 369.

The fact that the lot of ground upon which the building in question was erected belonged in indivision to the wife and her minor child of a former marriage, does not affect the question. One of two joint proprietors may make and enjoy improvements on the common property, and that fact is only important when it comes to a settlement between the joint proprietors, the one making the improvements being in any event entitled to reimbursement, without which the other can not share the resulting benefit. 6 N. S. 616; 10 An. 255. For the purposes of this case it is therefore the same as if the whole property belonged to the wife. The improvements made by the plaintiffs having inured to her separate benefit, and that of property which she held separate from her husband, the court below did not err in refusing to receive the evidence of the wife that she was coerced by her husband into signing the contract with plaintiffs. No such issue was made, and such evidence would have been inconsistent with her allegation that her husband did not authorize the contract.

The husband's defense is, to say the least, a singular one. It is substantially that his wife is not bound because this is a debt of the community and not her own; and that he is not bound because his obligation is simply that of surety for his wife, who not being bound, he is not. His argument proves too much. If the debt be that of the community, and the wife be not bound, he is as its head and master; and if it be not that of the community (as we have seen it is not), then by his own admission, and acts he is bound as surety.

According to the argument urged for the defense, the plaintiffs, after furnishing the materials and doing the work, and after its acceptance by the defendants, would be still held suspended in the anomalous condition of having contracted with no one and having no one bound to them for the price. This is neither just nor legal. The privilege was preserved by registry. It was not lost by novation, because, as we have seen, there was no novation. There was judgment in the court below against the defendants *in solido* for the amount of the plaintiffs' demand, with recognition of their privilege, as claimed, upon the building erected by them. It was correct, and is therefore affirmed with costs of both courts.

CASES
 ARGUED AND DETERMINED
 IN THE
SUPREME COURT OF LOUISIANA,
 AT
NEW ORLEANS.

AUGUST, 1877.

JUDGES OF THE COURT:

HON. T. C. MANNING, *Chief Justice.*

HON. R. H. MARR,

HON. A. DEBLANC,

HON. W. B. EGAN,

HON. W. B. SPENCER,

} *Associate Justices.*

No. 6699.

20 755
49 93

THE STATE EX REL. J. J. DANIEL VS. RUFUS E. ROSE

This court, or any member of the court, is competent to issue the writ of *habeas corpus* in any case that *might* be brought here on appeal. It is not necessary the appeal should be pending.

The Governor's commutation of a sentence to imprisonment at hard labor, which remits the punishment imposed, and substitutes a much milder punishment, is not executory, and hence can not entitle the condemned party to release from custody, until the commutation has been consented to by the Senate.

A PPEAL from the Second Judicial District Court, parish of Jefferson.
Pardee, J.

R. King Culler, for petitioner.

John J. Finney, for respondent.

The opinion of the court was delivered by

MARR, J. Daniel was convicted of murder, without capital punishment, in the Second Judicial District Court for the parish of Jefferson, and was sentenced to the penitentiary for life. On appeal the verdict

State ex rel. Daniel vs. Rose.

and judgment were set aside for illegality in the composition of the grand and petty juries; and the case was remanded for further proceedings. 28 An. 38. He was again indicted for the same offense, convicted without capital punishment, and sentenced to "imprisonment with hard labor for life in the State penitentiary;" and he once more sought relief by suspensive appeal.

Pending this appeal, on the sixth of January, 1877, the Governor, Kellogg, commuted this sentence by an instrument in writing, signed by himself, countersigned by the Secretary of State, and bearing the great seal of the State, the material part of which is as follows:

"To the Sheriff of the parish of Jefferson:

"Whereas, J. J. Daniel was tried and convicted, before the Second Judicial District Court, parish of Jefferson, of the crime of 'murder,' and sentenced to the penitentiary at hard labor for life;

"Whereas, for good and sufficient reasons I have seen fit to grant a commutation of said sentence to the said J. J. Daniel to three years imprisonment in the parish prison, from date of first commitment in December, 1873;

"Now, therefore, you will take notice of the said commutation and act accordingly, and for so doing this shall be your sufficient warrant and authority."

The term of imprisonment in the parish prison having expired in December, 1876, the prisoner was released by the sheriff and set at liberty; and on the second of April his counsel filed in the Supreme Court the following motion, in the case of the State vs. Daniel, which was entered on the minutes the same day:

"On motion of R. King Cutler, of counsel for defendant, and on suggesting that defendant, J. J. Daniel, was sentenced to hard labor in the State Penitentiary for life, and that thereafter W. P. Kellogg, then Governor of the State of Louisiana, commuted the punishment of said J. J. Daniel to imprisonment in the Parish Prison, and that said Daniel long ago served out his term of imprisonment in the parish, and that he, said Daniel, has been at liberty since about the first of January, 1877, it is ordered that the appeal herein taken by said J. J. Daniel be dismissed."

At the foot of this motion is the following:

"I consent to the appeal taken in the above-entitled cause being dismissed.

"(Signed)

H. N. OGDEN, Attorney General."

In June, the judge of the Second Judicial District Court, treating Daniel as a fugitive from justice, inasmuch as he had not satisfied the sentence pronounced, and had not been pardoned by the Governor with the consent of the Senate, nor reprieved; and the sentence had gone into

State ex rel. Daniel vs. Rose.

effect and had not been commuted in any legal sense or form, issued a writ for his arrest; and detention in prison until discharged in due course of law. Having been arrested under this writ, and being detained in actual custody under the sentence of the court, the prisoner applied to me for the writ of *habeas corpus*. The facts as stated appear of record, and by the petition and the return; and there is no controversy about them.

The representative of the State excepted that neither the Supreme Court, "nor any of the judges thereof, has any authority to issue the writ of *habeas corpus* herein, the court having no longer any appellate jurisdiction over the case of the State of Louisiana vs. J. J. Daniel."

This exception was withdrawn at the hearing; but as every judicial tribunal must either assume jurisdiction without question, or determine whether it has jurisdiction when it is questioned or questionable, I am not relieved of the necessity of inquiring whether I have authority to grant and to proceed upon this writ.

The constitution, article seventy-seven, declares that: "The Supreme Court, and each of the judges thereof, shall have power to issue writs of *habeas corpus*, at the instance of persons in actual custody, when they may have appellate jurisdiction;" and article seventy-four confers upon the Supreme Court jurisdiction in criminal cases, on questions of law only, whenever the punishment of death, or imprisonment at hard labor, or a fine exceeding three hundred dollars, is actually imposed."

The court of which I am a member has not now jurisdiction in the case of the State vs. Daniel in which the appeal was dismissed in April last. The language of article seventy-seven does not require that the court should have jurisdiction by an appeal actually pending; the requisite is that the matter shall be such that the court *may* have appellate jurisdiction ultimately, in the event that the proceedings in the court of first instance reach a point at which an appeal would be admissible.

Since the sentence was pronounced in the case of the State vs. Daniel, an event has occurred which, as he claims, has relieved him of that sentence; that is, he relies upon the commutation, and the completion of the term in the parish prison as a perpetual bar to further proceedings against him. The only question is whether the commutation has this effect; and this is purely a question of law, and it arises in a criminal case in which the punishment is hard labor. If the Governor had the power thus to commute the sentence, the prisoner is not subject to detention; and he should be discharged. If the Governor had not this power, the prisoner should not have been released from prison; and he must be remanded into custody to be dealt with according to law.

The case now presented, is, therefore, a new one, in which none of the issues involved in the original proceeding in the district court, and brought up to the Supreme Court for review on the appeal, can arise.

Perhaps the better practice would have been to have applied to the judge of the district court for the writ of *habeas corpus*; and to have exhibited the commutation in support of the application. If the judge had decided that this did not entitle the prisoner to be discharged, he might have appealed to the Supreme Court. I am not prepared to say, and I shall not so decide now, that it was not equally at the option of the prisoner to make his application to one of the judges of the Supreme Court, as he has done. The question to be solved by me is precisely that which would have been submitted to the Supreme Court, on appeal, if the proceeding had been taken in the district court in the first instance; and the case seems, therefore, to come within the letter of article seventy-seven of the constitution. *In favorem libertatis*, I should be inclined to grant the writ in every case where there was not manifest want of authority; and I proceed, therefore, to consider the merits.

The constitution, article fifty-eight, declares that: "The Governor shall have power to grant reprieves for all offenses against the State, and, except in cases of impeachment, *shall, WITH THE CONSENT OF THE SENATE, have power to grant pardons*, (and) remit fines and forfeitures, after conviction. In cases of treason he may grant reprieves until the end of the next session of the General Assembly, in which the power of pardoning shall be vested. *In cases when the punishment is not hard labor, the party, upon being reprieved by the Governor, shall be released, if in actual custody, until final action by the Senate.*"

This article, except the last clause, italicized, which is new, is copied from antecedent constitutions: 1864, article fifty-two; 1852, article forty-four; 1845, article forty-seven. Section eleven of article three of the constitution of 1812 differs in that it seems not to have made the power to remit fines and forfeitures dependent upon the consent of the Senate; that it uses the words "*approbation of the Senate*," instead of "*consent of the Senate*;" and that it omits the words, "*after conviction*."

This recurrence to the several successive constitutions of the State shows that the people of Louisiana have never seen fit to confer upon the Governor absolute power to grant pardons. From the organization of the government, under the first constitution, uniformly, this delicate and most important power has been subject to and dependent upon the consent of the Senate. The power to grant reprieves is absolute and unlimited, except in cases of treason; but under the existing constitution, as under those which preceded it, the Governor can not otherwise extend clemency to convicts without the consent of the Senate.

I have searched in vain for any express grant of power to the Governor to commute the punishment prescribed by law, or to interfere with the sentences pronounced by the judicial tribunals otherwise than by reprieve, or, with the consent of the Senate, by pardon. The reprieve is

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merely a respite, a postponement of the execution of the sentence of the law, as pronounced by the judge; and it is usually granted in order that time and opportunity may be obtained for the final action of the Governor and the Senate on an application for pardon.

Manifestly, in this case, the Governor did not intend to grant a reprieve. The reprieve leaves the sentence in full force, except that the execution is temporarily suspended; whereas, in this case, the act of clemency purports to have set aside, abrogated the sentence, by substituting a new and wholly different punishment. The statutory alternative for death, where the verdict of "guilty" is qualified by the addition of the words, "without capital punishment," is hard labor for life in the penitentiary; and that alternative was the necessary legal consequence of the verdict in this case. The object of the Governor was to relieve the convict of this, the only statutory alternative and penalty; and to substitute imprisonment for three years in the parish prison. The detention of the accused in prison, from the time of his first commitment to the execution of the sentence, is merely for safe-keeping, and it is not in legal intendment, punishment for the offense. In this case the term of imprisonment in the parish prison had actually expired when the commutation was granted; so that the convict was discharged immediately and without punishment.

The Governor could not have understood that he was granting a pardon in the usual sense of the term; because he must have known that he had no power to do this without the consent of the Senate. Obviously he intended to intervene between the convict and the punishment prescribed by law; and, by commutation of the sentence, which it seems to have been assumed did not require the consent of the Senate, to afford all the relief and benefit of an absolute formal pardon without the delay and uncertainty of the final action and consent of the Senate.

In the case of Wells, convicted of murder and sentenced to death in the District of Columbia, the President granted him "a pardon of the offense of which he was convicted, upon condition that he be imprisoned during his natural life; that is, the sentence of death is hereby commuted to imprisonment for life in the penitentiary of Washington;" and on the same day Wells accepted the terms offered in these words: "I hereby accept the above and within pardon with condition annexed."

Some three years after, Wells applied to the judge of the Circuit Court of the District of Columbia for a writ of *habeas corpus*, upon the ground that the President had no power to attach the condition, and that the pardon was absolute. The Circuit Court held that the President had power to commute the punishment, and remanded the convict to the penitentiary. The case was taken to the Supreme Court of the United States; and it is reported in 18 Howard. Two of the judges

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thought the court was without jurisdiction; another maintained that the President had no power to attach the condition; that the pardon was absolute; and that the prisoner should be discharged. The majority of the court decided that the power conferred upon the President by article two, section two of the constitution, "to grant reprieves and pardons for offenses against the United States, except in cases of impeachment," necessarily includes every form and species of pardon; that the commutation of the sentence was a conditional pardon, which, when accepted, became obligatory upon the convict; and that he was lawfully detained in the penitentiary. See also a discussion of the power of the President to grant pardon in *Garland's case*, 4 Wallace.

In some of the States—for example, Pennsylvania, Illinois, Texas—the Governor has power, by express constitutional grant, to commute sentences and punishment; but where there is no express law authorizing it, the commutation can be maintained only in virtue of the pardoning power, and as a modification, a condition of the pardon.

In Louisiana there is really no occasion for the exercise of this power. Certain crimes are punished with death. If in any such case the jury prefer, for any reason whatever, that the accused, although guilty of the crime as charged, should not suffer death, the addition of the words "without capital punishment" to the word "guilty" consigns the convict to hard labor in the penitentiary; and this is the only mitigation of the death penalty which the Legislature has chosen to allow; and it has intrusted this mitigation to the jury, whose solemn duty it is to consider, with all possible care, all the facts and circumstances and from them to determine the guilt or innocence of the accused. Pardon can be granted only after conviction. Conviction and sentence vindicate public justice and the offended majesty of the law; and if the executive and the Senate, calmly reviewing the facts and circumstances, conclude that the accused should not have been convicted and ought not to suffer the penalty, the organic law has wisely conferred upon them, not upon one or the other of them, the power to grant him a pardon; to open his prison door; and to relieve him of the disabilities and disfranchisement consequent upon conviction.

In certain crimes, characterized as detestable, comparatively of rare occurrence, the punishment is fixed and absolute, hard labor for life. In other cases there is a wide range in the duration of the punishment. There are no degrees of murder; but the accused may be convicted of a lower grade of crime, manslaughter, and be sentenced to hard labor for any term not exceeding twenty years.

In most cases the maximum and minimum of punishment are fixed; and the judge presiding at the trial will appreciate the facts, and graduate the punishment accordingly. Juries usually give all due weight to

every extenuating circumstance; and when they convict, in cases in which the penalty is not fixed and absolute, there is ample opportunity for the judge, in the exercise of his legal discretion, so to temper justice with mercy as to make any commutation, or interference with the sentence, short of an absolute pardon, not only unnecessary, but, in most cases, improper.

The organic law of Louisiana, like that of the other States, has separated the powers of the government into three distinct departments; and it is the peculiar province of the judiciary to ascertain the guilt of the accused, and to declare and impose the appropriate punishment; and interference by either of the other departments would, inevitably, tend to obstruct the proper administration of justice. If a convict merits any punishment, that which the law prescribes and the sentence imposes should be inflicted; if he does not deserve to be punished, he should be pardoned. The power to pardon is indispensable, because cases will occur in which this power alone can prevent wrong and injustice; but it will prove a curse to society instead of a blessing where it is not exercised with prudence, and in strict conformity to the grant.

If the power to commute the sentence of a judicial tribunal exists under the constitution of Louisiana, it is simply as a form of pardon, an incident to the power to grant pardons; and as the power of the Governor to grant pardon, in any case, is dependent upon the consent of the Senate, that form of pardon which consists in the commutation of the sentence, like every other pardon, whether absolute or qualified, equally requires the consent of the Senate.

I have gone thus at length into this discussion, because I have understood that the practice has prevailed to a considerable extent, of late years, of extending executive clemency to convicts by way of commutation, by the act of the Governor alone, without the consent of the Senate. There is no warrant for this in the organic law of Louisiana; and it can receive no countenance, it is entitled to no respect in the judicial tribunals.

The fact that the Attorney General consented to the dismissing of the appeal, on motion of the counsel of Daniel, is without significance. The appeal could not have been dismissed without this consent; but the State was the appellee and was asking for nothing; and the dismissing of the appeal left the verdict and judgment appealed from in full force, except so far as the sentence might be affected by the commutation.

It is evident that the prisoner would not have dismissed his appeal, would not have abandoned his last hope of escape from imprisonment at hard labor for life in the penitentiary, if he had not relied confidently upon the commutation as an effectual and unquestionable bar to further proceedings against him. I am inclined to think that the court would listen

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favorably to an application to rescind the order dismissing the appeal, and to reinstate the appeal; but that is a matter which I can not entertain, and about which I can not undertake to say what might be the action of the court.

It was suggested in argument that I might, in the event of my refusal to discharge the prisoner, make some order by which the execution of the sentence would be suspended until he could have an opportunity to move the court, at its meeting in November, to reinstate his appeal; but this would be simply a respite, a reprieve, which I have not the power to grant. The extent of my authority, under this proceeding, is to inquire whether the prisoner is lawfully deprived of his liberty; to discharge him if he is unlawfully held in custody, or to remand him into custody, if his imprisonment is lawful. The power to grant a reprieve in such a case belongs absolutely and exclusively to the Governor; and I think this is a proper case for an application to the Governor for a reprieve, in order that the prisoner may have the benefit of his appeal, which was suspensive, and which was evidently dismissed under a misapprehension and in error, in the event that the court should see fit to reinstate it on his motion. I am not to be understood as offering any advice, or making any suggestion to the Governor, as to what his action should be in the event of such an application to him by the prisoner.

It only remains for me to say that the commutation relied upon by the prisoner is a mere nullity; that the dismissing of the appeal removed the only obstacle to the execution of the sentence under which he is held in custody; and that his detention is lawful.

The writ is therefore dismissed; and the prisoner is remanded into custody, to be dealt with according to law.

No. 6341.

JOSEPHINE JOHNSON, TUTRIX, VS. CLARK & MEADER.

The dismissal of a suspensive appeal, for want of the proper bond will not prevent the appellant from taking a devolutive appeal, within the legal delay.

The payment of *feri facias*, under the threat of the sheriff to seize and sell defendants' goods, is not of itself conclusive of his acquiescence in the execution of judgment against him.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J.*

Gibson & Gibson, for plaintiff and appellee.

Kennard, Howe & Prentiss, for defendants.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

MANNING, C. J. Final judgment having been rendered against defend-

29	762
45	734
29	762
110	674
110	676

ants for \$859, a devolutive appeal was prayed and granted, which the plaintiff moves to dismiss on the following grounds :

First—That the suspensive appeal heretofore taken by the defendants having been dismissed for want of a legal bond, they are not entitled to another appeal.

Second—That the judgment of the lower court has been voluntarily executed by the appellants, the writ of *feri facias* having been satisfied by them by payment before seizure.

Third—That the defendants can have no standing before this court, by reason of their fraudulent and criminal conduct in the suspensive appeal hereinbefore taken and dismissed.

The appellee has a right to demand the dismissal of the appeal if the appellant has neglected to give a sufficient bond, or omitted any other legal formality; but a judgment of dismissal pronounced on such demand does not preclude the appellant from having the judgment of the lower court reviewed, if he claims his second appeal within the year. The present appeal is within time. The right of appeal is constitutional, and it is neither our duty nor inclination to impede or obstruct it. *Smith vs. Vanhille*, 11 La. 380; *Dugas vs. Truxillo*, 15 Annual, 116.

The defendants did not voluntarily execute the judgment of the lower court. They disregarded the sheriff's first notice, requiring payment of the *feri facias*, whereupon he informed them that if payment was not made by a given hour he should seize, advertise for sale, and sell their stock in trade, and to that end the officer proceeded to prepare in form his notices of seizure. To avert this the defendants paid, and took immediate legal proceedings to stay the fund in the sheriff's hands. The consequences of a seizure of their stock, and its advertisement for sale, would have been far-reaching and most injurious to them. Their payment, to avert such consequences, can not be held in any other light than compulsory. The act should be unequivocal to authorize a presumption of the abandonment of so important a right. *Leggett vs. Peet*, 1 La. 296; *Yale vs. Howard*, 24 Annual, 458.

We should be very loth to adopt the third ground of dismissal, and thereby charge the defendants with complicity in the criminal practices of others, of which we had occasion to speak with just severity in our opinion read on the former application for dismissal. We have no reason to know or believe, from the record or in any other way, that the defendants were cognizant of, or privy to the alteration of the records, the discovery of which provoked our animadversion, and we can not punish them for that fault, or deny them a legal right because one formerly representing them has done a flagrant wrong.

The motion to dismiss can not prevail.

No. 5160.

JOSEPHINE BREARD VS. THE MECHANICS' AND TRADERS' INSURANCE COMPANY.

The testimony of witnesses will have no weight with this court, if intrinsically improbable, and suggestive of collusion, and conspiracy.

The defense that plaintiff has violated, in some particular, the policy of insurance sued on, must be proved by the defendant.

A wife holding property in her own name, donated to her by her father, during marriage, has an insurable interest in it.

APPPEAL from the Fourth District Court, parish of Orleans. *Lynch, J.*

Cotton & Levy, for plaintiff and appellant.

H. N. Ogden, for defendants.

The opinion of the court was delivered by

MANNING, C. J. The object of this suit is the recovery of three thousand seven hundred and fifty dollars, the loss alleged to have been caused by the burning of plaintiff's residence, and the further sum of five hundred dollars for loss occasioned by the burning of her furniture, the former being insured by the defendant for forty-five hundred dollars, and the latter for five hundred. The defense is that plaintiff wilfully caused the burning with intent to defraud the company—that she did not comply with the requirements of the eighth condition of the policy—that the affidavits of loss contain an overstatement of the value of the property injured by fire with the view of deceiving the company—and that she had no insurable interest in the property.

The case hinged on the charge of arson in the lower court, and the judge sustained the defense in that particular, and rendered a decree in favor of the defendant. We differ *toto cælo* with his conclusions.

The fire occurred on the night of 27th. of September 1870. Two or three weeks before, the plaintiff went to Mississippi on a visit to her father, taking her children with her, and leaving her house and its contents in charge of a woman who lived next door, and who was her laundress. This woman is the wife of Edward Johns, of whom we shall hear more anon. The husband of plaintiff is a steamboat-man, sometimes captain, at others clerk, always part owner. He was in the Ouachita trade then, and at the time of the fire was on the river *en route* to New Orleans. He was absent when his wife left on the visit to her father, and she had suggested to him in a note to give Johns written authority to look after the house. Accordingly on his return from that trip, he sent for Johns, wrote the authorization, gave him a dollar and a dram, and left port for the Ouachita. Arriving at New Orleans on next return trip, he heard of the conflagration, and of some suspicious circumstances of

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Johns' conduct, presently to be noticed, whereupon he made affidavit charging Johns with arson and had him arrested and imprisoned.

Here are events in a natural order with an air of *vraisemblance* enveloping them. And now begins the series of judicial investigations, and disclosures preceding and accompanying them, which have entailed serious consequences upon many of the parties to them.

Edward Johns, thus imprisoned on the charge of arson, discloses to Edgeworth, captain of the police at Algiers and Gretna, that he did burn the house, but it was at the instigation of Captain Breard, and under a promise of reward—that when Breard gave him the written authorization to take charge of the house, he also employed him for the incendiarism for which he was to receive one hundred dollars, and paid him one dollar thereof on the spot, perhaps to bind the bargain. Breard was in his turn arrested, and carried before the parish judge for preliminary examination, when Johns being produced as a witness swore that he had never told Edgeworth that Breard had employed him to burn the house. Breard was discharged. Johns remained in prison, and at the next term of the district court, not he, but Breard was indicted for complicity in the burning. Breard was again arrested, was admitted to bail, gave bond, and when called for trial did not answer, and his bond was forfeited. He had fled.

Johns shall be permitted to tell his own story. He is speaking on 22 of December 1870 under oath. He is a laborer cutting wood on the levee, and lives in Freetown, Jefferson parish—is acquainted with plaintiff and her husband, but slightly with the latter—became acquainted with them the previous March. On the Friday previous to the fire received a message from Capt. Breard that he wanted to see him, and he went to the steamer on which Breard was employed where he found him. Breard took him up stairs in the office, and thus addressed him, "Edward, do you want to make some money?" The response was what might have been expected, and then Breard added—"that house of mine I have got pretty well insured. If you will set it on fire in the course of three or four days I will give you one hundred dollars for so doing." Johns took time for reflection. He received a dollar, went his way, returned the next day, agreed to execute the commission, and received the same sum as before. "On Tuesday the 27th. of September," we will now quote literally, "I made up my mind to accept Capt. Breard's proposition, and on that night between the hours of 11 and 12 o'clock I procured a gallon pot with some coal oil and pitch pine and repaired to the premises, went up stairs, placed the pot and pitch pine on the southeast corner of the house under the rafters, and applied the match to the coal oil and pine and left the premises, and in about half an hour after I left the house, the fire made its appearance and the buildings were burned down."

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The testimony of one Bradley at one of the criminal investigations is in evidence on this trial. He is a friend of Johns, and was told by him that the house of Breard was to "go up." Bradley communicated this to his brother who informed the President of the Insurance Company and two officers were sent over whom he secreted near the premises, but Johns told him he could not burn that night "as all the furniture he wanted to save was not out of the house." Witness informed "the specials" of this change of the programme and they went away. The next Tuesday witness' wife told him Johns had been to see him and left word the house was to be burned that night, whereupon witness went to bed and to sleep, and heard about eleven or twelve o'clock the noise of people hurrying to the fire. The two special officers were not there that night. "I believe, says this witness, the man (meaning Johns) is too honest to do this thing of himself. I believe he was hired to do it."

Edgeworth's testimony follows. He was captain of police and was the officer who arrested Breard and Johns, and to whom the latter made his confession. We hear now of confessions by Breard also. Breard told him he had a note to pay for a new boat that was building for him. He don't recollect its amount, but Breard told him he had to raise money, and that this man Johns was aware of it, and probably that was the cause of the fire. Johns told him the place or part of the building where he had applied the combustible materials, and on the day after the fire he found some of the pine there and also the pot in which had been the oil. He also found some of the furniture concealed in the grass, and some in the attic of Johns' house. Mrs. Breard told him that Johns had been left in charge of the house, and she hoped things would not go hard with Charley (meaning her husband.) He was acquainted with Breard in Caldwell parish where they both formerly lived. Breard had never put him off the boat while coming down the river for not paying his passage.

This is the testimony upon which the judgment of the lower court is founded, sustaining the defense that the burning of plaintiff's house was procured by her husband. The perjury is transparent. Edward Johns, whose sole occupation is occasional wood cutting on the levee, and who knew Breard but slightly, is sent for by the latter and in the clerk's office of a steamboat is employed to commit the crime of arson. So little privacy was observed that Blanks, one of the witnesses, went into the office while Breard was writing the note authorizing Johns to look after the house and protect it, and the interview between these two comparative strangers, in which the bargain was consummated, lasted says Blanks about ten minutes. Johns communicates his purpose to his friend Bradley, through whose instrumentality two special officers are detailed to watch the progress of the conspiracy and who attend once,

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but are not summoned by Bradley to witness the final catastrophe, although he was apprised through his wife of the appointed time for its completion. Bradley takes no steps to defeat the perpetration of this villainy, but goes to sleep in the immediate vicinity, complacently assuring himself that his honest friend was too good to commit such an act unless he was paid for it. And this too after he had heard from Johns' own lips the reason for not burning on the first night appointed was that he had not time to remove all the furniture he wished to appropriate. When the boat arrives which brought Breard to the city a day or two after the fire, Edgeworth, an officer of police, goes on board with a warrant of arrest for him, informs Breard of it, and is immediately told by him that he had to raise money to pay for a new boat he was building, which Blanks in another place says was to cost a hundred thousand dollars, and that this negro Edward Johns whom he scarcely knew was aware of his necessity, and probably that, Breard is supposed to say, was the cause of the fire. Mrs. Breard expresses to Edgeworth her hope that matters will not go hard with her husband, the proof being that Mrs. Breard was at the time of the fire in Mississippi, and did not return until six weeks afterwards, when the charge against her husband had been investigated by the parish judge, and he had been discharged. Her return was in November, and the second arrest of Captain Breard was not made until December after the finding the bill against him by the grand jury on the testimony of Johns and Edgeworth.

Edgeworth found the morning after the fire furniture, supposed to have been in the burned house, in the possession of Johns. Rhodes, another witness, states that some of it was in the garden of Johns concealed in the grass, and other articles up stairs in his house, and a carpet was found in a barrel on his premises covered up with wood. It was not surprising that Johns was arrested. A day in prison made him communicative, and Edgeworth is promptly at hand to hear from him the disclosure that Breard was the real criminal, a statement he declares to be untrue when testifying before the committing magistrate in Breard's presence a few days afterwards. The final result is that Breard is indicted and flies, and Johns, who by his own confession to Edgeworth, repeated twice afterward in separate judicial proceedings, was the active and avowed perpetrator of the act of arson, is at large unpunished.

The impression made on our minds by the examination of this record is that Breard is the victim of a foul and hideous conspiracy, the instigators of which were prompted by conscious guilt and the need of a shield to protect from its penalty on the one hand, and the gratification either of personal vindictiveness or cupidity on the other.

Thirteen witnesses were sworn at great length, all of whom unite in according to Breard a reputation for integrity, honorable dealing, and a

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blameless life. Some of them had known him from his infancy, all had at some time had business affairs with him, and speak from their own knowledge. No gentleman, says one, has a better reputation. I don't think, says another, there is a blemish on his character. I always found him correct, says a third, who had credited him to the amount of \$11,000. Yet another says he had credited him for \$12,000 and he could have more if he wanted it, and at the time of these events Blanks and he were under contract for a new and costly boat.

The testimony of Breard himself is also taken. His answers are prompt, concise, responsive to the interrogatories, outspoken, and entirely devoid of evasion or any semblance of shuffling. There are no hesitations, no labored or confused explanations, no parrying of uncomfortable inquiries, or partial statements of occurrences. We have scanned it closely, and we do not find there the efforts of a criminal to disguise his guilt, but rather the plain and unvarnished recital of events as they transpired. The reprehensible, and nearly fatal cowardice, which impelled him to flight rather than stand at bay and break the toils of his snarers, implies a consciousness of guilt when considered by itself, but in the light thrown upon it by the developments of all his surroundings, it can be explained but not justified. It may not be unimportant to add that the first ground of defense does not attempt to include the plaintiff in the charge of complicity in procuring the burning, but only her husband, and our opinion is that it is not sustained as to him.

We shall briefly dispose of the others. The second ground does not specify in what particular the plaintiff has not complied with the eighth condition of the policy, and we find that application was made in due time to the defendant by notice, accompanied by an account of the loss and damage sustained. The third, relative to the overstatement of value, is not substantiated by proof. Three witnesses for the defendant state the value of the burned property to be thirty-five hundred dollars. Five witnesses for the plaintiff, not including her husband, estimate the value at sums ranging from forty-five hundred to sixty-five hundred dollars. The fourth objection to recovery is the want of an insurable interest in the plaintiff. The title to the property is in her name. The conveyance is to her father by sale, who in the same act donates it to his daughter. He paid two thousand dollars for the purchase. At first Breard and Blanks bought together. Breard subsequently purchased the interest of Blanks and made considerable repairs, the sum total of cost being more than the sum for which it was insured. The donation of the father was direct to the daughter, and the payment by the husband was for the provision of the wife.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court is avoided and reversed, and that plaintiff have and re-

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cover of defendant the sum of three thousand seven hundred and fifty dollars with five per cent per annum interest thereon from the 29th. day of October 1870, and costs of both courts.

Rehearing refused.

No. 6455.

29	768
111	197

RHODA E. WHITE vs. MYRA CLARK GAINES. ON RULE TO TRAVERSE ANSWERS OF GARNISHEES.

When the principal parties, and the thing demanded, in two suits, are different, the judgment in one can not be pleaded as *res adjudicata* in the other suit.

A simulated transfer of property will not protect it from the pursuit of the real owner's creditors.

A PPEAL from the Fifth District Court, parish of Orleans. *Cullom, J.*

R. De Gray, and Semmes & Mott, for plaintiff in rule.

Finney & Miller, for garnishees.

J. Q. A. Fellows, for defendant in rule, appellant.

The opinion of the court was delivered by

MANNING, C. J. In 1872 the plaintiff obtained judgment against the defendant in the Fifth District Court of New Orleans for thirty thousand dollars with interest, with the right of issuing execution for twenty thousand one hundred and five 20-100 dollars, being fifteen per centum of the amount of money and property proven to have been recovered, collected, and realized by the defendant since May 30th. 1864, as heir, daughter, and devisee of Daniel Clark, and reserving to plaintiff the right to take out execution from time to time for fifteen dollars out of every hundred dollars that may hereafter be recovered or realized, or which may heretofore have been recovered or realized, of property of Daniel Clark's estate, until this judgment is fully satisfied.

The defendant appealed from this judgment, J. Q. A. Fellows being the surety on her suspensive appeal bond. Some time afterwards, and before the appeal was heard, objection was made in the proper form to the sufficiency of the surety, and upon order being made to furnish additional security, J. H. Oglesby, Louis Schneider, Patrick Irwin, and W. S. Pike became sureties on the defendant's appeal bond. The appeal was unsuccessful. This court affirmed the judgment.

Suit was then instituted on these appeal bonds, and judgment was rendered against the five sureties—Fellows, Oglesby, Schneider, Irwin, and Pike—against Fellows for twenty thousand one hundred and five 20-100 dollars, and against the four others for the same sum, to be dis-

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charged by the payment of the amount for which each had obligated himself. A suspensive appeal was taken from this judgment, and Oglesby and Schneider became sureties for Fellows on his appeal bond. The appeal resulted as did the first, and the four solvent sureties paid each \$5,323.20 in satisfaction of the judgment. Fellows paid nothing. ✓

In November 1875, additional property or money having been realized by defendant, another execution was obtained by plaintiff for eighteen thousand five hundred and twelve 96-100 dollars, and process of garnishment was issued, and interrogatories were addressed to the city of New Orleans, S. M. Todd, A. Schreiber, J. Q. A. Fellows and J. H. Oglesby. The first four answered that they were not indebted, had no funds etc. Oglesby answered that he held an order of date May 26th. 1875, signed by Fellows and addressed to Todd, directing the latter to deliver to Oglesby, or hold subject to his order, a previous order of Mrs. Gaines on him (Todd), dated May 30th. 1874, in which she had transferred to Fellows the remainder of the judgment in "Gaines vs. City of New Orleans." Oglesby explained in his answers that this order of Fellows was to indemnify himself and Louis Schneider "against loss or damage and liability upon, and growing out of the appeal bond signed by himself and Schneider, Irwin, and Pike as sureties of Fellows on the appeal bond furnished by him in the suit of Rhoda E. White vs. Myra Clark Gaines."

We must go back in this narrative somewhat in order to make this reference to another judgment comprehensible. Mrs. Gaines had recovered \$125,266.72 with interest, from the city of New Orleans by judgment rendered in the Circuit Court of the United States, and S. M. Todd and A. Schreiber had been appointed trustees by that court for the purpose of collecting this judgment and paying \$40,000 of it to James Emmott, and the residue to Mrs. Gaines or her order. She had given several orders on this fund, in aggregate more than the amount to be paid Emmott, and finally she gave Fellows an order for all the residue. That is the order of 30th. of May 1874. A year afterwards, Fellows transferred this residuum to Oglesby for the purpose above explained.

The object of these garnishments is to subject this residuum to the satisfaction of plaintiff's execution for over eighteen thousand dollars. The process is based upon the theory that the transfer or order of 30th. May 1874 was not real, and therefore Mrs. Gaines was owner of this residuum at the moment of seizure, and is now. The answers of the garnishees Oglesby and Fellows were traversed, and the simulation of the transfer was established to the satisfaction of the lower court. There was judgment accordingly, and hence this appeal.

The plea of *res judicata* is first interposed, and is based upon the following judicial proceedings.

After Mrs. Gaines had obtained the judgment against the city of New

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Orleans in the U. S. Circuit Court, various parties asserted before that tribunal rights claimed by them in and upon that judgment. Among them was the present plaintiff, who claimed an older lien than any other by virtue of a mortgage of thirtieth May, 1864, which had been given by Mrs. Gaines to plaintiff and another, whose rights plaintiff had acquired, to secure the payment of \$30,000 with interest. The contract providing for this payment was the basis of the suit in the Fifth District Court, which resulted in a judgment.

The claim of priority in lien, urged by Rhoda White in the Circuit Court because of her mortgage, was the thing to be adjudged by that tribunal. This is apparent from the opinion of the Circuit Judge delivered in support of his decree. He says,

"To secure the performance of this contract, Mrs. Gaines conveyed by said mortgage to Mack and Mrs. White all the estate, property, rights, and interests of every kind and nature, legal and equitable, real, personal, and mixed, or of any other nature and description whatsoever in or to which Mrs. Gaines is entitled, or has any claim, right title or interest, as the heir or devisee or daughter of Daniel Clark deceased, situate in the State of Louisiana. The property conveyed by this mortgage is the property which comes to her as the heir or devisee of Daniel Clark. This would include all real estate of which Clark died seized, or in which he had any interest or estate, all personal property, and choses in action of which he was possessed, and all debts and demands due him at the time of his death of whatever nature and description.

But it seems to me clear that the language used in this mortgage to describe the mortgaged property does not include the rents issues and profits of land which accrued long after the death of Clark, and long after title to the land had vested in his daughter. These rents are not derived from Daniel Clark's estate, but are the fruits of the estate of Mrs. Gaines. The rents recovered in this case are rents which accrued to Mrs. Gaines after 1834, twenty one years after Mrs. Gaines' title to the realty, out of which the rents arose, had vested in her. They are the proceeds of her own estate, and not of Daniel Clark. The rent of mortgaged property is personal property, and not capable of being mortgaged by the law of Louisiana. But even if it had been shown that the rents from real estate, devised to Mrs. Gaines by her father, was included in the terms of the mortgage, the mortgage would not have been valid as to such rents."

The Circuit Judge, proceeding to judgment, says this mortgage is not an assignment or transfer of title to any particular fund, and concludes that Mrs. White, "having reduced her claim to judgment, stands so far as the fund to be produced on this judgment is concerned, in the position of an ordinary judgment creditor of Mrs. Gaines with the right to issue

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execution and seize any property belonging to her, but subject to liens and vested rights thereon existing before her levy, but she had no lien resulting from her contract and mortgage."

To establish the plea of *res judicata*, there must be an identity of parties, of capacity, of object, and of cause of action. The party most interested in the present proceeding is Oglesby, for himself and Schneider, neither of whom were parties to that of the U. S. Circuit Court. The thing demanded in that forum was the recognition of plaintiff's prior lien upon a fund, arising out of a mortgage in her favor. Here it is the right to the residuum of that fund, arising out of its seizure under a *feri facias*, to be made effective through a personal judgment against the garnishees. Marcudé teaches—"La cause, qui doit être la même dans les deux demandes pour que la seconde soit écartée comme déjà jugée, c'est le principe qui engendre immédiatement le droit qu' une partie prétend exercer et que l'autre lui conteste * * * du reste, l' *objet* se trouve par la réponse à cette question : que demande le plaideur ? et on trouve la *cause* par la réponse à cette autre question : sur quoi le plaideur fonde-t-il immédiatement sa prétention ?" Explication du Code Napoléon, tome 5. p. 152.

We do not sustain the exception of the thing adjudged, and proceed to the consideration of the question of simulation.

Mrs. Gaines thus testifies—"Mr. Fellows paid me no consideration whatever for the order of 30th. May 1874, but was to hold the same for my own use and benefit, and that he would pay me every dollar after the previous orders were paid. I had no knowledge that Mr. Fellows on the 26th. of May 1875 transferred to J. H. Oglesby the remainder and residue of said judgment. * * * I had no knowledge of said transfer, and Mr. Fellows had no right to make such transfer."

This is the version of the signer of the order. The person in whose favor the order is drawn can now be heard. His letter to Mrs. Gaines of date January 22d 1867 is as follows—"De Gray has traversed the answers of the garnishees in the Rhoda White judgment, and taken out certain proceeding against Todd and Schreiber to make them pay the whole of the Rhoda White judgment. Interrogatories for you to answer will be sent to Washington Wednesday to be used in evidence against them, and so it defeats all our claims."

These interrogatories were answered by Mrs. Gaines on 2d of February 1876, and from them the extract first given above is taken.

On 21st. of March following another letter is written by Mr. Fellows to Mrs. Gaines—"I fear you have made De Gray certain of getting his entire judgment, and had it not been for this decision of yesterday it would have ruined me. He has recorded against me and bearing against all my property that (\$20,105) judgment, and is seeking for the balance

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of the judgment on an execution upon his second judgment for about \$19,000. I shall in that way be left in the lurch entirely and totally ruined. He will take all I ever had from you and \$20,000 more with nothing more to meet it. This will be the case unless I can contradict or explain your answers in which I think you are mistaken."

In the previous December, a witness states that he was present at an interview between Mrs. Gaines and Mr. Fellows, when the latter read to the former his answers to the interrogatories addressed to himself, and which are on file, and added—"you have heard what I have sworn to, and you will probably be called upon to answer as a witness, and it is necessary that you should answer in the same manner. You must swear that I am the owner of that judgment and that it was given to me for services. Mrs. Gaines said, how can I do so when I am the owner. Fellows replied, well it is necessary you should do so. If you don't you will lose every cent of it."

The recitals of conversations between these parties by witnesses are received with circumspection, but their conformity to the contemporaneous utterances of the parties themselves cumulates the proof of the latent design of the order, whose nature we are seeking to discover. In August succeeding the date of that order Mr. Fellows writes to Mrs. Gaines a "strictly confidential" letter—"On a final distribution of the judgment against the city for rents and revenues, there will be coming to you by an outside way \$3500 and probably as much more."

If the residuum of the judgment of the defendant against the city were transferred *bona fide* to Mr. Fellows, and for services rendered by him, it is not patent by what means any portion of that judgment can be coming to her in any way, and if it were meant that the outside way was to be the surrender either of part of his own fees, or of the trustees' commissions, there need not have been any special confidence enjoined touching a communication covering so benevolent a purpose.

We listened with gratification and approval to the oral comments of the counsel for the garnishees upon the pitiable spectacle presented to our view by the divulging by a client of the correspondence of her lawyer, with whom she had quarreled. However reprehensible this is, it must be remembered that in the present instance, the necessity for this disclosure was created by the correspondent himself. He had received, or was to receive, from his client \$24,840.92 for fees, that being the sum assigned him on the tableau of distribution of the proceeds of the judgment against the city. When it became necessary to ascertain a consideration for the order of transfer of the residuum of that judgment, he suggested "services" as a reasonable one. His preparation of matters of fact to be verified by her oath, and his direction of her conscience to the desired end, cannot pass from our review without an expression of con-

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demnation, and we believe it is an unusual feature in the correspondence of our professional brethren with their clients, to find a friendly suggestion that one hopes to find some way in which the sworn statements of the other may be contradicted.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court is affirmed with costs.

Rehearing refused.

No. 6308.

STATE VS. GUS ANDERSON.

The act of 1874 creating the "Superior Criminal Court," for the parish of Orleans, is constitutional.

The Legislature may establish as many district courts within the parish of Orleans as the public interests shall require.

The omission of the word "*district*," in the title of the act creating the "Superior Criminal Court," does not affect its character as a district court.

The Attorney General, or District Attorney, may employ associate counsel to aid him in a case, and, being present, may entrust to his associate the exclusive conduct of the case.

In criminal cases this court has jurisdiction only of questions of law, and hence can not review a verdict.

A PPEAL from the Superior Criminal Court, parish of Orleans. *Steele, J.*

A. P. Field, Attorney General, for the State.

E. C. Kelly, for defendant and appellant.

The opinion of the court was delivered by

MARR, J. The appellant was convicted of rape, in the Superior Criminal Court for the parish of Orleans, and sentenced to the penitentiary for life. After an ineffectual motion for a new trial, he brings the case before us by appeal.

His counsel assigns for errors, apparent on the face of the record:

First—That the act of the Legislature, No. 124, approved ninth of April, 1874, creating the Superior Criminal Court, is in violation of the constitution, article seventy-three, which vests the entire judicial power in a Supreme Court, district courts, parish courts, and justices of the peace.

Second—That the prosecution was not conducted by the Attorney General, nor by the Assistant Attorney General, nor by the district attorney for the parish of Orleans, but by S. J. N. Smith, Esq., who had no official capacity, and no authority to prosecute in the name and behalf of the State.

First—The act of 1874, creating the Superior Criminal Court, section

59	774
44	980

29	774
45	1156

29	774
48	1321

29	774
113	893

29	774
122	129

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one, declares that, "there shall be and is hereby created an additional district court for the parish of Orleans to be denominated the Superior Criminal Court for the parish of Orleans."

The constitution, article eighty-three, empowers the Legislature to establish as many district courts in the parish of Orleans as the public interest may require. The act of 1874, creating another district court, in and for the parish of Orleans, is within the power thus conferred; and the fact that the Legislature chose to call this district court the Superior Criminal Court, omitting the word "district" in its name and denomination, does not make it any the less a district court, or violate, in any sense, article seventy-three of the constitution.

Second—The indictment is signed by John McPhelin, in his capacity as district attorney. The minutes show that the district attorney was present in court when the accused was arraigned, and pleaded not guilty; and that he was present when he was put upon his trial. It appears that S. J. N. Smith, Esq., prosecuted for the State, in this behalf, by authority of the Attorney General. It also appears, by the minutes, that the district attorney was present when the motion for a new trial was made, when it was argued and submitted, when it was overruled, when the accused was sentenced, and when the appeal was taken.

It is not uncommon for the district attorney or the Attorney General to be assisted by other counsel; and if an assistant may appear, he may lead, or conduct the trial alone, by the permission of the district attorney or Attorney General. The accused has no right to complain that the Attorney General availed himself of the services of another, in the trial of this case, nor can his rights have been in any manner thereby prejudiced.

The motion for a new trial is on the grounds:

First—That the verdict is contrary to the law and the evidence.

Second—That since the trial accused has discovered evidence important to the cause, which he could not, with due diligence, have obtained before.

First—In criminal cases the jurisdiction of this court is limited to questions of law only; and if we had the authority to pass upon the evidence, and to decide as to its sufficiency to sustain the verdict, it would not be possible for us to do so without having the testimony before us.

Second—The affidavits filed in this case do not show that the evidence was discovered since the trial. There had been a trial before, the result of which was a conviction, and, on appeal, the case was remanded for a new trial, because of want of authority in the judge. On the second trial the accused did not ask for a continuance, but announced himself ready. It is manifest that he knew, from the date of the alleged commission of

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the crime, nearly two years before the last trial, whether he could prove by Joseph the facts alleged in their affidavits. The experience of one trial had developed the exigencies of the case; and nothing is stated tending to show any effort to procure the testimony of this witness.

We do not think good cause for a new trial was shown; and the ends of justice do not require us to interfere with the ruling of the judge *a quo* in refusing to open the case for a third trial.

The judgment appealed from is affirmed with costs.

No. 6695.

STATE EX REL. THOMAS JORDA VS. THE JUDGE OF THE FOURTH DISTRICT COURT.

The bond for a suspensive appeal from a money judgment *must* exceed by one half the principal, and interest due, at the date of the judgment. The court can not fix it for any less amount.

The surety on an appeal bond must reside within the jurisdiction of the court, and be amenable to its process in case any action against him on the bond should be had, and have property over and above any incumbrances on it equal in value to the amount for which he is bound.

APPPLICATION for writs of mandamus and prohibition.

G. H. Braughn and John B. Kunz, for relator.

Clarke, Bayne & Renshaw, for respondent.

The opinion of the court was delivered by

MARR, J. Judgment was rendered in the Fourth District Court, on the twenty-third of May, 1877, in favor of Davis, against Thomas Jorda, on a promissory note, secured by mortgage, for \$5700, with eight per cent interest from the first of September, 1876, five per cent on the aggregate of principal and interest for attorney's fees, \$4 50 protest fees, and costs of suit, with privilege and special mortgage on the property described.

On the fourth of June, Jorda moved for a suspensive appeal, which was granted on his giving bond, with good and solvent security, in the sum of \$9500; and on the same day a bond for that sum was filed, with four sureties, one for \$4000, one for \$2500, and two for \$1500 each.

On the fifteenth of June counsel for Davis, the plaintiff, took a rule on Jorda to show cause why the appeal should not be set aside and dismissed, on the grounds:

First—That the bond is not good, and such as is required by law.

Second—That the sureties are not good and solvent, and are not such as are required by law.

On the trial of this rule a mass of evidence, oral and documentary, was

29	776
62	106

29	776
e112	565
112	566
112	567

29	776
122	49

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offered. The court decided that the bond was not sufficient; and set aside the appeal. The plaintiff was proceeding to execute the judgment when Jorda applied to this court for a mandamus to compel the district judge to grant him a suspensive appeal, and for a writ of prohibition to stay proceedings in the meantime.

In answer to the rule *nisi*, granted by this court, the judge states that the insufficiency of some of the sureties was proven by the testimony; and that the signature of Pedro Martinez, as one of the sureties in the appeal bond, was a forgery. As each of the sureties bound himself for part only of the amount, it was necessary that all should be good and solvent.

We have carefully examined the testimony taken in the district court; and we concur with the judge in his conclusion that the bond is not such as the law requires; and that it is wholly insufficient. The surety for \$2500 owns furniture which he estimates at from \$500 to \$600, and real estate which he thinks may be worth from \$3500 to \$4000. He testifies that this property was assessed for taxation at \$2000; that he applied to the Board of Assessors to have this valuation reduced; and upon the showing he made, supported by his affidavit, the valuation was reduced to \$1700. He owes \$1100, secured by mortgage on this property, and some \$300 besides. His insufficiency, as well as that of Pon, one of the sureties for \$1500, is manifest.

Jose Martinez testifies that he was present when his brother, Pedro, signed the bond; and he swears that Pedro is worth more than the \$1500 for which he bound himself. Other witnesses prove that judgments for small amounts, against Pedro, remain unsatisfied, notwithstanding the efforts of constable and sheriff. His judgment creditors do not know where to find property to satisfy their claims.

Pedro Martinez is a dealer in tobacco and cigars; and he has had occasion, more than once, to give bond for his appearance to answer for violations of the internal revenue laws. His signatures to these bonds, and to papers filed in the State courts were produced; and they have been brought up for our inspection. We do not undertake to sit as experts in handwriting; but no great skill is required to perceive the wide difference between the several signatures proven to be genuine, and that which is affixed to the appeal bond in this case; and the comparison confirms the testimony of the professed experts.

In January, 1876, Pedro Martinez was indicted in the United States Circuit Court, for feloniously removing internal revenue stamps from cigar boxes, and having them in his possession with intent to defraud the government. He was arrested and admitted to bail; and was afterward surrendered by his surety. He was again admitted to bail; and, on the fifteenth of May, 1877, Thomas Jorda became surety, in the sum of \$1000,

for his appearance. On the sixth of June, Pedro was called, and on his failure to appear, his surety, Jorda, was called to produce him, which Jorda failed to do; and, thereupon, the recognizance was forfeited.

Jose Martinez says his brother, Pedro, has gone to New York, to sell some cigars. No witness gave the date of his departure; but it is evident that he is a fugitive from justice; and the application of Jorda for a continuance of the rule to enable him to procure his testimony was properly denied, as it was not indicated when or where he could be found.

Whether Pedro Martinez signed this bond or not, the proof shows his want of sufficiency. But if he had ample means, he would not be good security. The good security required by law, must reside within the jurisdiction of the court, and be amenable to its process, in the event of a resort to the appeal bond.

The law requires that a suspensive appeal bond, in case of a money judgment, shall exceed by one half the amount of the judgment. C. P. article 575; and jurisprudence and long uniform practice have settled the interpretation that the amount is the total sum due, at the date of rendering the judgment, including interest, and excluding the costs of suit. *Ross vs. Pargoud*, 2 La. 85; *Brown vs. Brown*, 9 An. 310. An accurate calculation will show that the bond is not sufficient in amount; and the fact that the amount was fixed in the order of appeal is without effect or significance. It is not the province of the judge to fix the amount of the bond, for a suspensive appeal, from a money judgment, because the law fixes it.

Judgment rendered twenty-third of May, 1877.....	\$5700 00
Interest from first of September, 1876, eight months and twenty-three days, at eight per cent.....	332 19
Five per cent on aggregate, \$6032 19, for attorney's fees.....	301 61
Protest fees.....	4 50
Total at date of judgment, twenty-third of May, 1877...	\$6338 30
One half.....	3169 15

Amount of bond required for suspensive appeal..... \$9507 45

The maxim *de minimis* does not apply; because there can be no suspensive appeal, where there is not a bond, with good and solvent security, residing within the jurisdiction of the court, exceeding by one half the amount for which the judgment was given, if it be for a specific sum. The law attaches equal importance to each and to all of these conditions; and if one of them be wanting the defect is fatal.

The relator is not entitled to the relief which he seeks at our hands; and it is therefore ordered, adjudged, and decreed that the rule *nisi*, granted in this case, be discharged, and that the relator, Thomas Jorda, pay the costs of this proceeding.

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No. 6614.

STATE VS. WILLIAM WILLIAMS.

The Legislature may, within constitutional limits, make any changes in the boundaries of parishes, and of judicial districts. It may, in forming judicial districts, divide the territory of a parish into two, or more districts.

The act of 1876, making the Sixth and Seventh Municipal Districts of the parish of Orleans a part of the *Second* Judicial District, is constitutional.

The Seventh Municipal District of the parish of Orleans being a part of the territory of the Second Judicial District, the Superior Criminal Court for the parish of Orleans has no jurisdiction of any offense committed in said municipal district.

A PPEAL from the Superior Criminal Court, parish of Orleans. *Whitaker, J.*

H. N. Ogden, Attorney General, for the State.

J. N. Hagins, for defendant and appellant.

The opinion of the court was delivered by

MARR, J. The accused was convicted of burglary and grand larceny in the Superior Criminal Court for the parish of Orleans, and was sentenced to the penitentiary for four years on the first charge, and two years on the second. On the refusal of the court to grant him a new trial he appealed.

The offenses were committed in the Seventh Municipal District of the parish of Orleans, on the twenty-eighth of May, 1876. The information was filed on the seventeenth of October, and the accused was tried and convicted on the twenty-first of February, 1877. The sole question is as to the jurisdiction of the Superior Criminal Court for the parish of Orleans.

The Seventh Municipal District was the city of Carrollton, in the parish of Jefferson, part of the Second Judicial District of the State, established by the act of 1860. By act No. 71, of 1874, approved March 23, this territory was detached from the parish of Jefferson, and annexed to the parish of Orleans and city of New Orleans, as the Seventh Municipal District. By the second section of this act this territory was to "be and remain and constitute a part of the Second Judicial District of the State."

In our opinion this provision of the act was within the power of the Legislature. The jurisdiction of the courts of a parish extends to all the territory and all the inhabitants within the limits of the parish, where no law otherwise provides. Article eighty-three of the constitution of 1868 requires that the judicial districts shall remain unchanged for four years; and in the Remmers case, just decided, we held that the four years have reference to the judicial term, which expires at each general election, counting from the month of November, 1868. It was within the power of the Legislature to detach this territory at any time, and to an-

nex it to the parish of Orleans, but it was not competent to detach it from the judicial district to which it belonged, and to place it in another judicial district until the general election in November, 1876, at which time the judicial term expired.

By act No. 45, of 1876, approved eighteenth March, it is declared that the Second Judicial District shall be composed of the parishes of St. Bernard, Plaquemines, Jefferson, and the Sixth and Seventh Municipal Districts of the parish of Orleans. In the Remmers case we held that the effect of this act was suspended, so far as the Sixth District was concerned, until the expiration of the term of the judge of the Second Judicial District, that is, until the general election, in November, 1876. The Sixth Municipal District, which was annexed to the parish of Orleans, was clearly under the jurisdiction of the First Judicial District from and after the general election of 1872; and we held that it necessarily so continued until the general election in November, 1876. The Seventh Municipal District, by the express terms of the act of 1874, No. 71, remained a part of the Second Judicial District until the expiration of the term of the judge of that district, November, 1876; and this act of 1876 simply left these two districts in the precise condition in which they were at the date of its passage, until the general election of November, 1876.

If the act of 1876 be a legitimate exercise of legislative power, the Sixth and Seventh Municipal Districts are subject to the exclusive jurisdiction of the court of the Second Judicial District, for the Sixth and Seventh Municipal Districts. The Seventh Municipal District has never been subject to the jurisdiction of the courts of the First Judicial District; and the Sixth Municipal District ceased to be part of the First Judicial District, from and after the general election in November, 1876.

We must refer here to the opinion just pronounced in the Remmers' case, for a full discussion of these questions; and we might content ourselves with what is said in that case, but for the fact that the accused was tried in February, 1877, when the entire territory and all the inhabitants of the parish of Orleans were subject to the jurisdiction of the courts of the First Judicial District, unless some law otherwise provided. The act of 1876 does otherwise provide; but it is urged that this act is in violation of the constitution; and it becomes necessary for us to pass upon and determine that question.

We premise that the Legislature, without any special grant of power, may change the boundaries of the parishes; and may change the judicial districts so far as the constitution has not imposed restrictions on the exercise of this power. The constitution of 1868 has limited this power:

First—By providing that the number of judicial districts shall not be less than twelve, nor more than twenty.

Second—By requiring that the judicial districts shall remain unchanged for four years.

In determining whether the Legislature has power, under the constitution to do any act, the *argumentum ab inconvenienti* is entitled to but little weight. In all such cases the question is one of power, not of convenience, not of public policy, not of wisdom. If the power exists, the judicial tribunals have nothing to do with questions of the propriety or the policy of the exercise of that power.

It is supposed, and argued, that the Legislature has no power to divide a parish in the formation of judicial districts. The constitution, article twenty-nine, provides that no parish shall be divided in the formation of a senatorial district, the parish of Orleans excepted. There is no such prohibition with respect to judicial districts; and the argument is one of inference and deduction only, and of the supposed inconvenience of subjecting the territory and inhabitants of a portion of the parish to the jurisdiction of one judicial district, and the territory and inhabitants of another portion to the jurisdiction of another judicial district. It is worthy of note that this prohibition is applicable to the power to form senatorial districts alone; and as the power to divide the State into judicial districts is not subject to any such limitation, it would seem to have been the intention of the constitution to leave it within the discretion of the Legislature to divide parishes, in the formation of judicial districts, if the public convenience should so require.

The parish of Orleans has not been actually divided; that is, it remains in its integrity, composed of its seven municipal districts, five of which are part of the First Judicial District, and two, the sixth and seventh, are made parts of the Second Judicial District by the act of 1876.

This act creates a court, the "Second Judicial District Court for the sixth and seventh municipal districts of the parish of Orleans;" the sessions of which are to be held in the seventh district. In every sense this is a district court of the parish of Orleans. It has no jurisdiction out of the parish of Orleans, it sits in the parish of Orleans, its executive officers are the civil and criminal sheriffs of the parish of Orleans, its clerk is elected by the qualified voters of the sixth and seventh municipal districts of the parish of Orleans, and its jurors are the registered voters of the sixth and seventh municipal districts of the parish of Orleans. Article eighty-three of the constitution empowers the Legislature to establish as many district courts in the parish of Orleans as the public interests may require; and nothing in the constitution limits the power of the Legislature to confer upon such courts such jurisdiction as it may choose, except that the amount in controversy must be above one hundred dollars. It is nowhere provided that all the district courts or any of the district courts which the Legislature may establish in the

parish of Orleans shall have jurisdiction throughout the parish; and there is no good reason why a district court might not be established in each municipal district, having no jurisdiction beyond the limits of that district, if the Legislature should think the public interests so required.

The constitution requires that the clerks of the district courts shall be elected by the qualified voters of their respective parishes: the district judges are also to be elected by the qualified voters of their respective districts, article eighty-three; and article six declares that "a party accused shall be entitled to a speedy public trial, by an impartial jury of the parish in which the offense was committed." Does it thence follow that the jurors must be taken from the entire parish; or that the clerk must be elected by the voters of the entire parish? As to the judge, the constitution simply requires that he shall be elected by the qualified voters of his district. As to the sheriffs, there is no difficulty, because they are elected by the qualified voters of the entire parish, and they exercise their functions and authority throughout the parish.

By the constitution of 1845, article eighty-one, it was provided that the justices of the peace should "be elected by the qualified voters of each parish." The act of 1846, No. 103, required that the justices in the country parishes should be elected in each ward of the several parishes by the qualified voters and residents of that ward.

The act No. 106, of 1846, provided that the justices in the city of New Orleans, six in number, should be elected by the qualified voters of the representative districts respectively. Their jurisdiction was concurrent throughout the parish, except that portion lying on the right bank of the river.

In Schmidt's case, 1 An. 387, it was urged that this act was in violation of article eighty-one of the constitution; and that the justices must be elected by the qualified voters of the entire parish. The court held that this division of the country parishes into wards, and the city into districts, and the election of the justices by the qualified voters of the wards and districts respectively, "according to all reasonable principles of construction, can not be held to be contrary to the text of the constitution, and it is certainly in accordance with the sense of a large majority of those who framed it."

The act of 1876 does not deprive any voter of the right to vote for the judge having jurisdiction over him. The qualified voters of the Sixth and Seventh Municipal Districts had the right and the opportunity to vote for the judge of the Second Judicial District for the Sixth and Seventh Municipal Districts of the parish of Orleans; for that judge is elective by the qualified voters of his entire district; they had the right

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and the opportunity to vote for the clerk of that court, because he is elective by the voters of those two districts exclusively; they had the right and the opportunity to vote for the executive officers of that court, the civil and the criminal sheriffs of the parish of Orleans, because they are elective by the qualified voters of the entire parish of Orleans; and they have the right and privilege of being tried by jurors selected from the entire number of the registered voters of those two districts, who are also jurors of the parish of Orleans, although they are exempt from jury duty in any other court.

The inhabitants of these districts thus have the right to vote for every elective officer, having authority over them; and the right to be tried by jurors of their own parish. Their rights are not diminished in any respect. The object of the trial by jury in criminal cases is to secure the accused against punishment except by the judgment of his peers of the vicinage: and these citizens of the parish of Orleans are more favored in this respect than the inhabitants of the other districts of the city, because the jurors upon whose verdicts their lives, their liberty, and their property may depend are not drawn from the parish at large, but from these two districts alone, from the vicinage, the immediate neighborhood.

The act of 1876 violates no clause or feature of the constitution; it impairs, in no respect, the rights of the citizen. It is, in point of fact, not merely not inconvenient to them, but most convenient—giving them, besides all the other advantages, a court near to them, and in exempting them from the jurisdiction of other courts, civil and criminal, except in matters of probate.

This act confers exclusive and unlimited jurisdiction, civil and criminal, on the court of these two districts; and it was perfectly competent for the Legislature to create that court, and to organize it precisely as provided by the act.

The Legislature of 1877, by act eighty-five, repealed this law; but it expressly suspends this effect until the expiration of the term of the judge of the Second Judicial District in November, 1880.

We have read with care and with pleasure the able arguments submitted to us in this and in the Remmers case; and our conclusion is that the Sixth Municipal District became a part of the Second Judicial District in November, 1876; that the Seventh Municipal District has never, since the act of 1860, been part of any other judicial district than that to which it belonged, as a component part of the parish of Jefferson; and that both these districts are now parts of the Second Judicial District, subject to the exclusive jurisdiction, except in matters of probate, of the Second Judicial District Court of the Sixth and Seventh Municipal Districts of the parish of Orleans.

The consequence is that the Superior Criminal Court was without juris-

diction of the offenses committed in the Seventh Municipal District, on the twenty-eighth of May, 1876; that it was without jurisdiction when the information was filed, on the seventeenth of October, 1876; and without jurisdiction when the accused was tried and convicted, on the twenty-first of February, 1877. The whole proceeding against the accused was *coram non judice* and void; and the judgment and sentence are mere nullities.

The accused, having been tried by a tribunal wholly without jurisdiction, has not thereby been put in jeopardy in the sense of the law; and he should be held to answer before the Second Judicial District Court, of the Sixth and Seventh Municipal Districts of the parish of Orleans.

It is therefore ordered, adjudged, and decreed that the judgment and sentence appealed from be annulled, avoided, and reversed; that the information be dismissed, and that the accused be held by the criminal sheriff of the parish of Orleans to answer for the offenses of burglary and grand larceny, with which he is charged, before the Second Judicial District Court, of the Sixth and Seventh Municipal Districts of the parish of Orleans.

DISSENTING OPINION.

EGAN, J. I dissent from the decree in this case, and adhere to the opinion expressed in the Remmers case, that the division of parishes in the formation of judicial districts should not be sanctioned. I can not see how it is possible to give full effect to the provisions of the constitution in regard to the trial by an impartial jury of the parish and those in regard to the election of clerks and sheriffs by the qualified voters of the parish, which in my opinion means the whole parish, and not any part of it. How can the right of trial by an impartial jury of the parish be said to exist when the juries are drawn from only part of the parish, and if it is competent to say that the jury may be drawn from the part of the parish nearest? Why not from that most distant from the accused or where the crime was committed? All these provisions must be considered in conjunction with the power to create judicial districts. This case and the act of 1876 afford an illustration of the difficulties growing out of an attempted violation of this principle. Neither can I assent to the division of the parish of Orleans, especially under the provision of the constitution which specially excepts that parish from the general rule as to division into judicial districts, etc., applicable to other parts of the State.

As to the argument that the Legislature had power to create the Second Judicial District Court for the Sixth and Seventh Districts under the

State vs. Williams.

general power conferred by article eighty-three, constitution of Louisiana, it is sufficient to say that act — of 1876 was not even an attempt at the exercise of that power, but was an attempt to divide the parish of Orleans for the formation of a judicial district not within the parish of Orleans, but partly within and partly without that parish, and in violation of the constitution to permit voters outside the parish of Orleans to have a voice in the selection of a judge exercising functions and presiding within its limits. It is clear from the title and terms of the act that the intention was to define and extend the limits of the Second Judicial District of the State, and not to create another district court in the parish of Orleans. This I think can not be done, and if attempted is fraught with inconveniences and difficulties so serious that they should in future deter from such legislation for that reason alone if the constitutional objection did not attach. Imagine, for instance, the clerk of the parish of Livingston called upon to act as such under authority as clerk of two different district courts sitting in the same parish at the same time, with different judges presiding by reason of a division of the parish in the formation of a judicial district. Until the legislation, the effect of which we are now reviewing, the uniform practical interpretation of the power given by the constitution to create additional district courts for the parish of Orleans had been in accordance with the views herein expressed.

No. 6742.

STATE EX REL. E. G. HUNTER, DISTRICT ATTORNEY, VS. JUDGES OF THE NINTH AND SEVENTEENTH JUDICIAL DISTRICTS.

The application for a mandamus to compel a district judge to preside at the trial of a criminal case in an adjoining district, does not bring the case before this court, and hence the law limiting the jurisdiction of this court in criminal cases does not apply.

Section 1068 of the Revised Statutes of 1870, providing for the interchange of two neighboring district judges, when one of them is recused, is unconstitutional.

When a judge is recused in a case in which he is *not* personally interested, he must select a lawyer, of proper qualifications to try it. When he is personally interested, the parish judge must preside in his stead.

ON application for a mandamus.

E. G. Hunter, District Attorney for the Ninth Judicial District, for relator.

Respondents for themselves.

The opinion of the court was delivered by

MANNING, C. J. An indictment for murder is awaiting trial in the parish of Rapides. **P. M. Richardson**, is the party accused, and he is the

State ex rel. Hunter vs. Judges of the Ninth and Seventeenth Judicial Districts.

brother in law of the judge of the district in which is that parish. The district attorney, proceeding under sec. 1068 of the Revised Statutes, gave notice to the presiding judge that he was recused in that case, and also that the judge of the seventeenth district, which adjoins the ninth, will be called on to hold the next term of court in the latter. He also gave notice to the judge of the seventeenth district that he would be required to hold that term. The two judges refuse to interchange, and the prosecuting officer has taken this proceeding by mandamus to compel them to comply with the requirement of that statute which is, that it shall be the duty of the judges thus notified to interchange accordingly.

The judges answer that the law requiring their interchange is unconstitutional, and the judge of the ninth district also pleads want of jurisdiction, in this to wit, that this court can issue a mandamus only in aid of its appellate jurisdiction, and that jurisdiction is restricted to those cases in which the punishment of death, or imprisonment at hard labor, or a fine exceeding three hundred dollars, is actually imposed.

The criminal proceeding is not before us now, but an original process, the object of which is to ascertain whether a judge wrongfully refuses to perform what is alleged to be his duty, and to compel its performance if that refusal is wrongful. The alleged duty is to interchange with the judge of an adjoining district for the purpose of trying, or having tried a prosecution for murder, and our inquiry is confined to the question of whether the law which imposes that duty upon him is constitutional. The exception to the jurisdiction is overruled.

The constitution prescribes that a judge shall select a lawyer to try recused cases in which he is not personally interested, and when he is thus interested the parish judge must be called on to try the case if it be in the district court. art. 90. All the cases in which a judge may be recused are thus divided into two classes, the ingredient of personal interest being the distinctive feature of the one, and the want of it that of the other. It seems to have been the special object of that article to contrive a mode by which the cases, in which a judge is recused, might be speedily tried and without the delay and inconvenience consequent upon an interchange of judges. There is a careful omission of any provision touching such interchange, although it had been of frequent practice under the constitution of 1852. The revisal of the statutes, made in 1870, reproduces the law of 1858 which dictated to the district attorney the course followed in the present instance, and it is argued by him that the insertion of that law in the revisal, with article 90 of the constitution of 1868 in force, shews that a conflict between them was not then supposed to exist.

Nevertheless we think they are in conflict, and that section 1068 of the Revised Statutes must therefore be declared null.

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The criminal prosecution of the judge's brother-in-law is not a case in which that officer is personally interested in the sense in which those words are used by the constitution, and therefore he must select a lawyer, who has the qualifications required for a judge of his court, to try the case. The district attorney very aptly inquires, if pecuniary interest is a sufficient and proper reason for depriving a judge of the liberty of selecting a lawyer to try a case, can it be possible that the framers of the constitution intended to confer that power upon him when the case is a criminal prosecution in which the life of a near relative is involved, or when disgrace to some member of his family would be the consequence of conviction.

We are very sensible of the grave omission to provide for such cases, and of the danger which might sometimes attend the exercise of the power to appoint a lawyer, where the prosecution, if successful, would entail painful consequences upon the judge. Our only answer to this appeal to our perception of the unfitness of entrusting this power to the judge is *ita lex scripta est*, and we must assume that a judge, in exercising this delicate function, will be more than ordinarily careful to select a lawyer whose ability and impartiality is both unquestioned and unquestionable so that the administration of the law may be above reproach.

It is therefore ordered that the provisional writ heretofore granted be set aside, and the peremptory mandamus is refused at the costs of the relator.

No. 6371.

STATE EX REL. JOHN KLEIN & Co. vs. ED. PILSBURY, ADMINISTRATOR OF FINANCE, ETC.

Any third person, who demands no subrogation, may tender to a creditor, either in his own name, or in that of the debtor, the debt due by the latter, in whatever species of property the debt is payable, and compel the creditor to accept the payment in that property.

In a mandamus proceeding to compel a public officer to receive warrants in payment of a debt, the issue of the *genuineness* of the warrants may be passed on. Warrants issued by a police board, which are not in the form required by law, in order to be received for taxes, will be rejected.

A PPEAL from the Superior District Court, parish of Orleans. *Lynch*, J.

John Ray, for plaintiffs and appellees.

Sam. P. Blanc, Assistant City Attorney, for defendant.

The opinion of the court was delivered by

SPENCER, J. Plaintiffs are brokers of said city. They allege that as such they were employed by a number of firms of New Orleans named in their petition, to pay for and obtain their several licenses from said

city. That in pursuance of their said employment, relators had applied to defendant, Ed. Pillsbury, Administrator of Finance, for said licenses, and had tendered to him in payment therefor, certain Metropolitan Police warrants described in relators' petition. That although said warrants are by express law made receivable by the city for such licenses, yet the said Administrator in disregard of his plain duty refuses to receive them, and issue said licenses. Wherefore he prays for mandamus which was granted *nisi*.

The defendant filed various exceptions—insisting in this court however only on the third one, which was in substance, that relators have no real interest in the matter; theirs are not the licenses to be paid, and they have no right to maintain an action to require the city officer to receive for the licenses of others, the warrants belonging to the relators.

This exception was not well taken. C. C. (old) art. 2130—"An obligation may be discharged by any person concerned in it, such as a co-obligee or surety. It may even be discharged by a *third* person no way concerned in it, provided that person act in *the name* and for the discharge of the debtor, or that, if he act *in his own name*, he be not subrogated to the rights of the creditor."

Art. 2131—"A third person may for the advantage of the obligor, put the obligee in default by offering to perform the obligation on the part of the debtor, even without his knowledge; but it must be for the advantage of the obligor, not merely to change the creditor."

In the case before us it is alleged and proved that relators acted as the employees, or at least at the request of the debtors, and we think they have the right, under the above articles to compel the creditor to accept payment—and it is not material whether they are acting in their own names or those of the debtors, as they do not seek or demand a subrogation, but a discharge of the debtor.

Defendant further denies the right of relators to proceed by mandamus, and sets up in defense that the warrants tendered are of doubtful authenticity and legality, and that he believes many of them are spurious and not genuine. He insists that the relators must first sue and establish the validity and genuineness of the warrants, before proceeding by mandamus.

We do not think so. Act No. 33 of the Legislature of 1874, declares in so many words that these police warrants shall be received "*for all licenses * * * due or to become due*" the city. The right to pay licenses therefore with these warrants is indisputable, unless said act be unconstitutional, of which we find no evidence. Our predecessors we think correctly held these warrants to be so receivable in the case of "the State ex rel. Ed. Lubie vs. the Administrator of Finance," not yet reported. This law does not require that these warrants be recognized

by judgment, before being *legal tender* for such license-taxes. It requires the city to receive them in payment. True if the administrator has doubts of their genuineness he may refuse and ought to refuse them, until there is proof thereof—just as he ought to refuse to take United States currency tendered, if he doubt its genuineness. If the holder of these warrants can not compel their receipt, until he has put them in judgment against the city, the law would be a dead letter; for it does not authorize the payment of licenses, *in judgments*, but in warrants, which would in the case supposed, be merged in the judgment and therefore not within the terms of the law. The fact that the city disputes the genuineness of these warrants, is a mere incidental issue, which courts must and can determine, when arising in proceedings by mandamus. Thus when a public officer is proceeding by mandamus for possession of the records of his office, if denied, it must be made to appear that he is the person exercising the functions of that office. And so of other collateral issues without number, which inevitably arise. If it were held that in a proceeding by mandamus incidental questions of this kind could not be determined, then indeed would the process be an empty form. If relators or those in whose interest they act, were tendering United States currency or coin, instead of warrants, in payment of the licenses, such a rule would leave them remediless, if the Administrator saw fit to dispute the genuineness of the bills or coin tendered. Yet we presume there can be no question of the right of the debtor of a license to proceed by mandamus, to compel the Administrator to receive currency in payment. Police warrants are as much *legal tender* for that purpose as currency. The remedy of the debtor is the same in both cases.

ON THE MERITS.

It seems that a large number of the warrants tendered in payment, were signed by the "chief clerk" and "accepted" by the "treasurer" of the Police Board—and issued early in the year 1869, for fiscal year of 1868. The only law then in existence authorizing the issuance of these warrants was the act creating the Board of Metropolitan Police, page eighty-five acts of 1868. By its thirtieth section it requires said warrants to be "signed by the president and any two other members of the board, attested by the chief clerk."

A board, such as that of the police, is a mere creature of the law, possessing no powers not conferred by statute, and when, without authority by legislative enactment to issue a warrant or note, all such paper when issued, is null in the hands of whomsoever it falls. 5 Denio, 517; 4 Denio, 520; McClure vs. Bennett, 1 Black, f. 189, and Mears vs. Graham, 3 ib., 144. *A fortiori*, where the form of warrant is prescribed, any other

kind of warrant is null and void; no paper, except that *especially permitted*, can possess the least effect. Little Rock vs. State Bank, 3 Eng. (Ark.) 227; Damon vs. Grauly, 2 Pick. 345; Randall vs. Vanbechten, 19 Johns, 60; 7 Cranch. 229; 2 *ib.*, 127.

The warrants therefore issued by the chief clerk and accepted by the treasurer, were not issued as required by law, and are not such warrants as the law requires the city to receive for license-taxes.

The decree of the court below was therefore erroneous, so far as it compelled the Administrator to accept these warrants in payment. They are of numbers and amounts following:

No. 1969.....	\$91 67	No. 1959.....	\$91 67
2807.....	91 66	1971.....	83 33
1970.....	83 33	1965.....	83 33
1945.....	83 33	1942.....	83 33
1946.....	83 33	1976.....	83 33
1944.....	83 33	2812.....	77 77
1953.....	83 33	1984.....	72 33
2294.....	72 33	1962.....	83 33
1974.....	83 33	1978.....	83 33
1981.....	72 33	6721.....	83 33
190.....	45 12	191.....	45 14
669.....	13 92	670.....	12 00
302.....	100 00	120.....	66 66
140.....	30 25	21.....	32 00
303.....	100 00	300.....	100 00
572.....	200 00	557.....	100 00
556.....	100 00	124.....	4 00
304.....	100 00	5867.....	79 33
530.....	15 00	6922.....	77 96
6923.....	67 20	6924.....	80 65
6924.....	77 96	672.....	13 92
671.....	14 40	666.....	15 00
508.....	300 00	573.....	200 00
567.....	300 00	580.....	200 00
562.....	300 00	7878.....	250 00
559.....	100 00	560.....	100 00
558.....	100 00	555.....	100 00
553.....	100 00		

It is therefore ordered adjudged and decreed that the judgment of the court below be so amended as to include among the rejected warrants, those above described, and as thus amended that said judgment be affirmed—relators paying costs of appeal and defendants those of the court below.

Catherine Riley vs. State Line Steamship Company.

No. 5449.

29 791
1118 1095

CATHERINE RILEY, TUTRIX, VS. STATE LINE STEAMSHIP COMPANY.

The owners of a vessel are not liable to the employee of a stevedore who has full charge of the unloading of the vessel, for injury to the employee caused by defective tackle furnished by the vessel, when it is shown that the tackle had no apparent defect and that the stevedore was an experienced, and competent one, who had the exclusive employment of his laborers, and control of the work. The owners are not liable for any injury caused by a defect in the tackle, arising from the ordinary wear and tear, unless a knowledge of such defect is brought home to them.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J.*
Trial by jury.

Frank McGloin and J. O. Nixon, Jr., for plaintiff and appellee.

H. H. Bryan, Jr., for defendants.

The opinion of the court was delivered by

SPENCER, J. Plaintiff brings this suit to recover \$25,000 damages, caused by the death of John Moriarty, her husband; \$10,000 of the sum claimed is damage done to the plaintiff and her children themselves; \$15,000 for damage done to John Moriarty, the right to which was transmitted to them at his death.

The facts are that while the steamship "Alabama," of the defendants' line, was being loaded at New Orleans, in May, 1873, an iron wheel, over which worked the rope for raising and lowering freights into the hold of the ship, and which was of course suspended above the hatch, broke or bursted into two pieces—one of which, descending, fell upon the head of John Moriarty who was at the time employed in the hold, assisting in stowing the cargo, from the effects of which blow he died very shortly after.

The contract for loading and unloading the vessel on that trip was taken by Joseph Cooper, an experienced stevedore, and he had full and entire control of the work. The vessel, as customary, furnished "the gins," as this hoisting apparatus was called. Cooper employed and controlled absolutely his own laborers. Among others, he employed Brookman, a boss screwman, who in his turn employed the said Moriarty, and it was as such employee that he was working at the time of the injury.

The vessel was a very fine one, entirely new, and this her first voyage. It is shown that the vessel was well supplied with tackle of all sorts, having no less than three of those gins or pully wheels on board.

The plaintiff asserts the liability of the steamship company on two grounds;

First—That as the vessel furnished this gin, the company is responsible for any loss or damage resulting from its defects, and that in point of fact said gin was old, worn out and unfit for its uses.

Second—That Cooper being an employee of the company, it is responsible for his neglect, in not having the gin properly oiled from time to time, while using it.

The principal issue of fact is about the state or condition of this gin, and the oiling of it.

As might be expected, there is a good deal of contradictory swearing. Brookman, the head screwman, especially, swears stoutly that the hole through the wheel (or sheave as it is called), was worn to nearly twice its ordinary or original diameter, and that the pin on which it revolved was also much worn, and that they were not kept properly oiled. Other witnesses, co-laborers of Brookman, speak with more or less positiveness to the same purport. Per contra, the defendants prove by witnesses that this gin was oiled; that they oiled it. Maginnis, the foreman of Stevedore Cooper, swears that he himself "rigged" the gin—i. e., he put it up and prepared it for unloading the vessel on her arrival at the bar. He says this gin was new when he fixed it and suspended it for work. It was suspended about twenty feet above the decks. His statements are strengthened by the proof, not contradicted, that this was a new vessel, and her tackle generally new. At all events, Cooper and Maginnis, who were both men of long experience, thought the gin good and sufficient, and could have had it replaced at any moment, if they had thought differently.

There is no proof that there was any *apparent* defect in this gin, at the time the company furnished it to Cooper and Maginnis, a few days only before, for unloading the vessel. On the contrary, at that time it is shown directly and by the probabilities of the case, that it was apparently good, sound and new. It is very true that the gin was in point of fact, either defective or insufficient, for had it not been so, it would not have broken; but it was *apparently* good and sufficient, in the opinion of men of experience and competency to judge.

Under our law, article 2320 C. C., the responsibility of masters or employers only attaches when they "might have prevented the act which caused the damage, and have not done it."

In a case like this, we think the utmost extent of the liability of the company would be, that they should employ a stevedore of experience and good repute, and that the tackle furnished on his requisition should be apparently good, satisfactory to the stevedore, and such as is usually furnished for like purposes. For non apparent defects, of which the company knew nothing, and which perhaps were inherent in the metal itself, out of which the wheel was cast, it would be unreasonable and unjust to hold it responsible, as well as unlawful. We all know that defects may and often do exist in metal, and especially in castings, which no human care and foresight can detect.

Catherine Riley vs. State Line Steamship Company.

It was sufficient, and the company discharged its full obligation when it furnished to an *experienced* stevedore, a tackle *apparently good and sufficient* and satisfactory. The company had nothing to do with the working or running of this machinery. It had no control of that. Cooper was an independent contractor, *employing his own labor*, and *pursuing his own methods* of doing his job. The company was under no obligation to look after the tackle further than to see that it was *apparently good* when delivered. If by wear and tear it became insufficient, on information and demand to that effect, it was its duty to furnish other tackle. We see no lack of care in the conduct of the company in this case. Men are but mortals, and are not expected to have the prescience of gods. Whether the wheel and axle became weakened by wear and tear, and for want of oiling, are disputed questions; but in our opinion are matters of no moment in the decision of this cause; for we hold that unless notified thereof, or at least knowing the facts, the company is not liable for such defects as were produced by the working of the tackle. As a matter of fact, however, we are not disposed to believe that the breaking of this wheel was from the wear of the sheave, which it seems, even by Brookman's testimony, was increased in diameter only from one-half to one inch.

In conclusion, we see nothing in the law or facts of this case justifying a judgment against the defendants.

It is therefore ordered, adjudged, and decreed by the court, that the verdict of the jury and judgment appealed from be annulled and avoided, and that plaintiff's demand be rejected with costs of both courts.

Marr, J., recused.

No. 6719.

F. C. MALAIN ET AL. VS. THE JUDGE OF THE THIRD JUDICIAL DISTRICT, ET AL.

The bond for a suspensive appeal from a judgment dissolving an injunction, need only be for an amount that shall exceed by one half the damages decreed by the judgment of dissolution, and costs.

An application for a mandamus should be made in the name of the State, but it is not absolutely necessary to do it, when the petition contains substantially what the law requires.

APPLICATION for a mandamus.

Z. T. Fournet and R. De Blanc, for relators.

Jos. A. Breaux, for respondents.

The opinion of the court was delivered by

MANNING, C. J. F. C. Malain and Jasper Gall allege that the first

named had obtained an injunction, restraining the execution of a writ of *fieri facias* against his property, upon a judgment for seven thousand dollars in favor of I. C. Cade, which injunction was dissolved with two hundred dollars damages. Gall was the surety on the injunction bond, and its amount is one thousand dollars.

A suspensive appeal was prayed from this judgment, which was refused by the district judge unless the parties executed an appeal bond exceeding by one half the amount of the original judgment. Afterwards on an allegation, supported by oath, of the absence of the district judge, application was made to the parish judge for the order, which was granted upon the appellants furnishing a bond for fifteen thousand dollars. They refused to give bond for this sum, and applied for a *mandamus* to compel the judges, or either of them, to grant them a suspensive appeal upon a bond exceeding by one half the judgment for damages and costs. This was granted in the alternative form, and we have now the answers and exceptions of the respondents to the petition of the appellants.

In this petition, it is alleged that a bond for twelve thousand dollars was furnished when the injunction was obtained. This is not true, if the certified copy of the injunction bond, produced by the relators, is a correct one. The amount of that bond is only one thousand dollars. If proper and timely action had been taken by the creditor, whose process was enjoined, to set aside the injunction because of the insufficiency in amount of that bond, we should not have refused him relief. But that question is not before us. The creditor submitted without complaint to the issuance of the restraining writ on a bond wholly inadequate to his protection, and went into trial of the injunction. The question now to be answered is, whether the appellant from a judgment dissolving his injunction must give a bond apportioned to the judgment, the execution of which was enjoined, or the judgment dissolving the injunction. The enjoined judgment was for seven thousand dollars. The judgment of dissolution was for two hundred dollars and costs.

It has been long held that the amount of the judgment of dissolution regulates the amount of the appeal bond. *State vs. Judge of 1st District*, 19 La. 167. *Stackhouse's case*, 21 Annual, 152. The relator is therefore entitled to a suspensive appeal from the judgment dissolving his injunction upon executing a bond exceeding by one half the amount of damages adjudged against him and the costs.

The respondents excepted to the form of the application for a *mandamus*, that it was not made in the name of the State. That would have been more regular, but is not absolutely essential. The writ must necessarily run in that form, and since the petition contains the sub-

Malain vs. Judge of the Third Judicial District.

stantial requisites for obtaining the relief sought, we have concluded after some hesitation to grant it.

It is ordered that the mandamus be made peremptory at the costs of the respondents.

Mr. Justice DeBlanc recuses himself in this case.

No. 6545.

MARIE L. BEEBE VS. JAMES P. GUINAULT ET AL.

The service of citation of appeal before the filing of the appeal bond, is not ground for dismissing the appeal.

The decree of the lower court granting, or refusing to grant an injunction, may be suspensively appealed from.

The plea of *res adjudicata* will not be considered, on a motion to dismiss. It must be referred to the merits.

A party applying for a writ of injunction, who has complied with all the conditions prescribed by law for its issuance, has a right to it, and courts have no legal power to refuse it.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J.*

J. Q. A. Fellows and R. Shackelford, for plaintiff and appellee.

W. E. Murphy, for defendant.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

MANNING, C. J. The motion to dismiss is based upon several grounds;

1. That at the time of service of citation of appeal, no bond had been filed.

It appears that the clerk issued the citation before the appeal bond was filed. This would be a good reason for asking for time to make a new citation, but is not for a dismissal. Irregularities of that kind, not imputable to the appellant, are not good cause for dismissing an appeal. *Batliff vs. his Creditors*, 14 La. 292. *Comstock v. Paie* 17 La. 515. *Grove v. Harvey* 3 Rob. 271.

2. That no appeal lies from the exercise of discretion by the judge in either granting or refusing an injunction.

It has long and often been held otherwise. This court will not interfere by anticipation with the exercise of that discretion by the inferior court, but it will revise the judgment in order to ascertain whether the discretion has been properly exercised. In every case in which the law leaves anything to the discretion of a court, a sound and legal discretion is understood, and not an arbitrary one. *Broussard v. Trahan* 4 Mar-

29	795
44	1084
29	795
52	1284
29	795
115	482
29	795
117	356
117	1083
29	795
120	639

Marie L. Beebe vs. Guinault.

tin 503, Sorrel v. St. Julien, Idem, 509, Girod's case, 18 La. 394. State ex rel. Beebe v. Judge of 6th. Dist. Court, Opinion book 45 p. 625.

3. That no suspensive appeal can be granted from a judgment on a rule *nisi*.

Appeals lie from final judgments. The judgment in this case refused the injunction. It will be difficult to find a judgment possessing a stronger element of finality than that.

4. That the executory process issued in this case was executed before an appeal was taken.

We find no evidence of such execution in the record.

5. That all the issues made in this appeal were made in another suit, and were passed upon by this court.

That is a matter to be heard on the trial, and determined thereafter, and cannot be a ground for dismissal.

The motion to dismiss cannot prevail.

The plaintiff applied to the lower court for an injunction, restraining the enforcement of an order of seizure and sale, alleging that she was under age when she executed the note and act of mortgage upon which the order was issued, and that the consideration of the note was not for her benefit, and that she was induced to execute them by the fraudulent representations of the defendant. These representations are then set forth in detail, and she made the required oath to the truth of her allegations.

An order was thereupon made by the judge, requiring the defendant to shew cause why the injunction should not be granted. Upon its trial the defendant's affidavit was permitted to be introduced in evidence, in which he denies the truth of the plaintiff's allegations, and sets forth with amplitude equal to her own his version of the causes of the litigation. Other testimony, offered by the defendant, was received, and upon considering the case as thus presented, the injunction was refused. The plaintiff appeals from this order or judgment.

The practice of issuing these rules *nisi* has become frequent, and is sanctioned by certain Rules adopted by the judges of the District courts of this city, which appear to have been generally acquiesced in. It would seem that some preliminary inquiry, assimilated in some degree to that prescribed by these rules, is both necessary and proper to be instituted, before a court should be required to order the issuance of a writ which inhibits a party from prosecuting an apparently just claim, and effectually and peremptorily clogs the advance of a creditor in its enforcement. Doubtless the necessity of such inquiry prompted the courts to attempt to provide the means for instituting it through the instrumen-

Marie L. Beebe vs. Guinault.

talities of these rules, but the authority for such provision must emanate from a different source. The legislature alone can amend the Code of Practice, and it is to the articles of that code which treat of injunctions that we must look for guidance as to the prerequisites for obtaining them.

These prescribe that in order to obtain an injunction the party applying for it must present a petition to that effect to a competent judge, stating under oath the facts which, according to his belief, render an injunction necessary, annexing to his petition his obligation in favor of the defendant for such sum as the court may determine, with the surety of one good and solvent person residing within the jurisdiction of the court, to secure the payment of such damages as may be sustained by the defendant, in case it should be decided that the injunction had been wrongfully obtained. art. 304. Other articles have reference to specific circumstances under which the writ may issue, and provide for dispensation with the surety, and also accord to the party enjoined the right to require proof in a summary manner of the truth of the facts upon which the writ is demanded. arts. 738—741.

If these requirements of the Code are complied with, the party applying for the writ is entitled to it as a matter of right. The penalty for obtaining it without sufficient cause is prescribed in the same article that imposes the conditions under which it is to be obtained.

The writ of injunction has been invoked of late years with a frequency that requires discouragement, but in the present state of the law, the remedy for these invocations, when made on frivolous pretenses or for coveted delays, rests with the courts. And when the penalties shall have been rigorously enforced through the medium of judgments for damages which the Code not only allows, but commands, it will not require a very long series of examples to attest the determination of the tribunals to deter litigants from converting a conservatory process, which was intended to be a beneficent shield, into a weapon of obstruction and oppression. Therefore

It is ordered, adjudged, and decreed that the order and judgment of the lower court is avoided and reversed, and the cause is remanded to be proceeded with according to law, the defendant paying the costs of appeal.

Clement & Tremoulet vs. Achille Sigur and Mrs. L. J. Sigur.

No. 6583.

CLEMENT & TREMOULET vs. ACHILLE SIGUR AND MRS. L. J. SIGUR.

Going into the Confederate lines, and remaining there during the late war, by the tutor of a minor, did not forfeit his tutorship.

The consideration of a negotiable note given by the tutor of the minor, as such, on the advice of a family meeting, may be inquired into in the hands of the payee, or of any third person who has taken it after maturity.

The tutor can not revive a debt against a minor which is prescribed.

APPPEAL from the Fifth Judicial District Court, parish of Iberville.
Dewing, J.

Samuel Matthews and E. D. White, for plaintiffs and appellees.

T. E. Grace and Barrow & Pope, for defendants.

The opinion of the court was delivered by

DEBLANC, J. The appellant, Achille Sigur, was born on the first of October, 1853. When his parents died, he was a child and remained with Mrs. Laurent J. Sigur until he was emancipated, on the sixth of March, 1872. John Adolphe Sigur was appointed as his tutor in the month of December, 1858.

On the fifth of March 1869, by virtue of an order from the probate court of the parish of Iberville, a meeting of the family of Achille Sigur was held before a notary public of said parish, and authorized John Adolphe Sigur, as tutor of said minor, to execute, in the latter's name, and to secure by mortgage on his property, three promissory notes, one in favor of Zalina Halphen, wife of Albert Gaillard, one to Charles Oscar Lauve, and one to Mrs. Laurent J. Sigur; said notes to bear eight per cent interest from date, and not to exceed, in the aggregate and exclusive of interest, the sum of \$15,000.

The deliberations of that meeting were approved and homologated by the court on the sixth of March 1869, and, on the thirteenth of March 1869, in accordance with the advice of said meeting and the order of the court, John Adolphe Sigur, as tutor of Achille, subscribed and delivered three notes, one to Mrs. Gaillard for \$1122 20, another to Mr. Lauve for \$950, and a third to Mrs. Sigur for \$7880 53, payable one year after date, at the Bank of America, in the city of New Orleans, with interest as therein stipulated.

The note in favor of Mrs. Sigur is now held by John B. Clement & Antoine C. Tremoulet. They have sued on it and allege that it was transferred to them for a valuable consideration and before maturity.

In his answer to that suit, defendant, after a general denial, admits the genuineness of the signature of John Adolphe Sigur to the note, but avers that he alone is liable for its amount, because:

1. To the knowledge of the payee of said note, and at the date it was

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delivered, he (respondent) had large sums of money in the hands of his tutor:

2. The family meeting which authorized the execution of said note was not composed as the law requires, and his tutor was, therefore, without authority to sign and deliver the same.

3. The proceedings by which he became the purchaser of the property mortgaged to secure said note are utterly null and void.

4. The family meeting then convened by his tutor was imposed upon by false representations and fraudulent combinations.

5. At the date of his appointment as respondent's tutor, John Adolphe Sigur was his debtor, and said appointment an absolute nullity.

6. If John Adolphe Sigur ever was his legal tutor, he became *functus officio*; in 1862, by his refusal to take the oath of allegiance to the United States, and by removing to and remaining within the Confederate lines, in disregard of general order No. 41.

7. The claim of Mrs. Laurent J. Sigur, when acknowledged by his tutor, was not due; if due, was barred by the prescription of three, five and ten years.

The first four grounds urged by appellant are untenable. To sustain either of them, we would have to look beyond and reverse decrees of court, which have not been appealed from, the parties to which are not all before us, and which can not be collaterally attacked. 15 An. 27. 23 An. 175. 24 An. 224.

The sixth ground is as untenable as the others. In 1862, Sigur was a member of the Confederate Legislature, and he simply discharged his duty in following that Legislature to Shreveport. If, in so doing, he forfeited his trust, then hundreds of tutors were released during the war, and in hundreds of cases, not they, but their wards would suffer from the effects of the alleged forfeiture. Would that be just? Assuredly not. As did the people he represented, when his cause was lost, Sigur returned to the United States an unrestricted and sincere allegiance, and the order relied upon, left unimpaired the rights and liabilities attached to his trust.

In the palmiest days of our jurisprudence, the highest court of the Republic said: "It may not be unworthy of remark that it is very unusual, even in cases of conquest, for the conqueror to do more than displace the sovereign and assume dominion over the country. The actual usage of nations, which has become law, would otherwise be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private rights should be annulled. 7 Peters p. 87.

What is the doctrine taught by Vattel? "Though one of the parties may have been to blame in breaking the unity of a State, and resisting

the lawful authority, they are not the less divided in fact. Besides, who shall judge them? Who shall pronounce on which side lies the right or the wrong. On earth they have no common superior. They stand, therefore, in precisely the same predicament as two nations who engage in a contest, and, notwithstanding the belligerent occupation of a portion of a State, its municipal or private laws remain unchanged."

The vitality of the decree of a court can be destroyed but by a court, and, as the tutorship springs from the law and a decree, no military order could, can, or ever did vacate a tutorship.

The seventh ground urged by the defense has arrested our attention. The note sued upon was signed by John Adolphe Sigur, as tutor of Achille. In that capacity he has granted the mortgage now sought to be enforced. The emancipated minor has attained the age of majority, and he is before us contending:

1. That the claim of Mrs. Sigur, when acknowledged by his tutor, was not due.

2. That, if due, it was prescribed at the date of the acknowledgment.

What proof have plaintiffs introduced of defendant's indebtedness to Mrs. L. J. Sigur? Henry Tremoulet testified "that the origin of said indebtedness was the expenses incurred for rearing and educating him, for back taxes and costs. From the college bills which he saw, he judges that Achille was indebted to Mrs. Sigur for much more than she claimed. They were both wealthy."

To his declaration no amount is attached, no date fixed. Howsoever respectable the witness, can a court, on that naked declaration, condemn the defendant to pay over \$12,000? The minor was wealthy, he was interested in two plantations, entitled to considerable revenues, and, nevertheless, his expenses were not paid and, to-day, threaten to wrest from him the scanty remnants of a large fortune.

On the tenth of June 1866, Mrs. L. J. Sigur wrote from New York, to John Adolphe Sigur, and, in that letter, she states; "*Jusqu'à présent je ne t'ai pas présenté le compte de mon fils adoptif, Achille; ma position ayant changé, je suis forcée de le soumettre, afin que comme tuteur tu l'approuves et aie l'obligeance de l'envoyer à Mr. Bernard Turpin. Tu verras, par le compte que je t'envoie, que les premiers années ne sont pas comprises etc.*"

When was that account sent, when acknowledged by the tutor? We find on the margin of said account, from Mr. Turpin, who, it is probable, knew nothing about it, a declaration in the following words and figures "*Certifié correct, Nlle. Orléans, le 14 février 1868.*" In the petition presented by the tutor to convene a family meeting, for the purpose of authorizing him to furnish a note to Mrs. Sigur, the latter's account is

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mentioned as one "*claimed*" by her, and its first acknowledgement is evidenced by the note itself, in 1869.

The balance alleged to be due Mrs. L. J. Sigur, on the sixth of May 1866, was, according to the account filed on the sixteenth of July 1869, \$4320 53. From the evidence of Henry Tremoulet, a witness of plaintiff, Achille's indebtedness to Mrs. Sigur was composed of that balance, of sheriff's, clerk's and attorney's fees and of back taxes due on the Richland and Old Hickory places.

There seems to be an error in this statement, as further on he said: "The origin of the note sued on in this case was for the fees of Oscar Lauve as counsel for the minor Achille; as well as he could recollect, a part of those fees was for services rendered to the minor in the proceedings by which the property was sold and the mortgage given to secure the note mentioned in the family meeting."

One reason to believe that this is an error is that Oscar Lauve testified that "the note sued upon in case No. 1610, another and a different suit, was given to him for professional services rendered to the minor Achille Sigur, in the matter of his father's estate, and in conformity with the deliberations of the family meeting held on the fifth of March, 1869." We can not and do not presume that these fees were included in the note furnished to Mrs. Sigur, as, otherwise, they would have been twice charged against the minor. It is probable that Tremoulet's evidence referred to the note furnished to Mr. Lauve and sued upon by Mrs. Gaillard.

From the tenor of Mrs. Sigur's letter, it seems evident that it was only in 1866, after the disasters of the war, that she determined to claim what she spent for Achille Sigur, her adopted son, from 1858 to 1865. That supposition is strengthened by the fact that she, the minor, and his tutor were rich—and that, from the date of his parents' death, until the emancipation of the slaves, the minor could have been amply provided for with his own and his tutor's means. His circumstances at that time, not only did not justify, but precluded the contracting of any debt in his name, for his rearing and education. His revenues should have been applied to that object. Mrs. Sigur's right to charge for that object commenced in 1866, from the date of her letter, not before.

Could Achille Sigur inquire into the consideration of the note signed and delivered by his tutor, and which had passed in the hands of third parties? He certainly could, and for two reasons. 1st: the plaintiffs themselves, in attempting to prove the consideration of the note, had opened the door to the evidence adduced by defendant to repel the presumption of consideration growing out of the execution and delivery of said note by his tutor. 2d: at the maturity of said note, as shown by the protest, it was in the hands of Mrs. Sigur's agent, belonged to her,

and was protested in her name. It was, therefore, transferred after maturity, after it was dishonored, and affected by all the equities between the original parties.

In the petition filed by John A. Sigur, as tutor, on March 3d, 1869, he stated "that the costs incurred for the sale of the two plantations and the taxes thereon due amounted to about \$1600; that said taxes and costs were paid by Mrs. L. J. Sigur, and thereby she became the creditor of the minor Achille for \$560." These plantations were sold under writs of fieri facias issued out of two judgments against John A. Sigur, executor, and an order from the probate court in the matter of the estate of Theodore Sigur, and there is nothing in the transcript to show the amount of either the taxes or costs. It can hardly be expected that, under such evidence, the appellant can be held liable for an amount of costs mentioned, but not fixed even in the sheriff's return.

The family meeting—it may be said—has acknowledged Mrs. Sigur's claim. On what evidence? The unsworn allegations of the tutor's petition. Her claim is not supported by her own affidavit or that of her agent, and—though we are convinced that neither of these parties was guilty of the fraud charged against them, we can not—without proof—or in disregard of the only proof we have before us, allow the whole of the claim transferred to plaintiff by Mrs. L. J. Sigur. That a portion of that claim is due, we do not deny, but what is that portion?

Defendant, in addition to the other grounds of defense, has filed, in bar of plaintiff's action, the plea of prescription, and that plea must prevail as to seven of the items in the account or statement of Mrs. L. J. Sigur, filed on the sixteenth of July, 1869. Those items are the following: \$1500, \$2400, \$500, \$350, \$41 25, \$86 10, \$40 03. These claims were prescribed at the date of their acknowledgment by the tutor, and he was without authority to renounce an acquired prescription. Rev. C. C. 3462. Old C. 3425.

Howsoever reluctant we feel to reopen and continue a controversy submitted to us, we are—nevertheless—constrained to remand this case, in order to give plaintiffs an opportunity to prove what Mrs. L. J. Sigur has or may have paid for the minor Achille Sigur, from the (6th) sixth of May (1866) eighteen hundred and sixty-six, inclusively, and up to the sixth (6th) of March (1869) and which may have been included in the note furnished to the said Mrs. L. J. Sigur, on the thirteenth of March (1869), eighteen hundred and sixty nine, by John Adolphe Sigur, as tutor of said Achille Sigur.

This decision renders unnecessary an examination of the bills of exception filed by the parties in the district court and not urged by them in this court, or of the objection made by defendant to the filing of the amended answer. In that amendment, the only important ground is the

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denial of the minor's indebtedness to Mrs. Sigur, and it was but the rehearsal of one of the averments of the original answer.

It is, therefore, ordered, adjudged and decreed that, as concerns the appellant, Achille Sigur, the judgment of the lower court be, and it is hereby annulled, avoided and reversed at plaintiffs' costs, and their demand rejected for all the items in Mrs. L. J. Sigur's account, charged before the sixth of May, 1866, and included in the note of the thirteenth of March 1869, sued upon by plaintiffs.

It is further ordered, adjudged and decreed that, in other respects, this case be remanded to the district court to be proceeded with according to law and this decision, reserving to the parties their rights of action and defense, against each other, from and including the sixth of May 1866.

No. 6664.

STATE EX REL JAMES L. COLE VS. JUDGE OF THE FIFTH JUDICIAL DISTRICT.

An interlocutory decree, rescinding a former order of the court made at its preceding term, which inflicts no irreparable injury on the complainant, can not be separately appealed from. It must come up when the case is appealed on the merits.

Injury to a party is irreparable, when the final judgment on appeal can not place him where he stood before the interlocutory decree complained of was rendered. Delay, increased labor, and expense, do not make up a case of irreparable injury.

APPPLICATION for writs of mandamus and prohibition.

George Wailes and Barrow & Pope, for relator.

Respondent, for himself.

The opinion of the court was delivered by

SPENCER, J. L. Grand & Co. instituted two suits against relator, Cole, in the district court of Iberville.

Relator, on the first of August, 1876, filed a motion to have Grand & Co. produce certain books, bills, vouchers, etc., supporting said motion by his oath that he expected to prove by said books, etc., that "the note sued upon is a partnership asset, so far as the same has any existence; that same was given in error and was obtained by fraud and by concealing the true state of the accounts of said partnership; that the errors in the same are so large as to show that no portion of said note was given for a valuable consideration, no part of the amount being due to the said partnership or to said L. Grand & Co." This motion was

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granted, and served on L. Grand, ordering the books to be produced on the eighth of August, 1876.

Grand & Co. failed to comply, and on the seventeenth of August relator moved to have the facts stated in his affidavit taken as confessed, which motion was duly served and set down for trial. On the eighteenth of August this motion to take for confessed was tried, and on the twenty-fourth of August the court sustained it and ordered that the facts which relator had sworn to as provable by said books be taken as confessed. Grand & Co. moved for a rehearing of this motion, which was overruled.

At a subsequent term of the court (in April, 1877,) (the defendant herein, Charles McVea, having been in the meanwhile elected judge thereof), Grand & Co. filed a motion to *rescind* the said order taking the said facts for confessed, as also to *rescind another order* which had been rendered, appointing experts and a surveyor, to determine and report upon a partition in kind, demanded by the relator of certain partnership property.

This motion to *rescind* was sustained, and the order appointing the experts, and the order taking for confessed, were rescinded and set aside. The relator thereupon asked for a suspensive appeal from these orders of rescission, as they were of a character to work him an irreparable injury. The court refused the appeal, and relator applies for a writ of mandamus, and of prohibition against further proceedings, until said appeal is heard.

Two questions are raised and elaborately discussed. First, as to the power and competency of the judge to revise or rescind interlocutory orders and decrees made in a cause at a previous term: second, as to whether these orders of rescission are such as work or may work relator an irreparable injury.

The first of these questions seems to us identical with the one, whether an order overruling a plea of *res adjudicata* can be appealed from. It is manifest that it can not, for the simple reason that if the plea is good the party may obtain relief on the final appeal. If the judge was without power to try the motion to rescind, by reason of the matters involved being of the nature of the thing adjudged, the question can be presented to this court, when the case comes here for final hearing. The rule is that where a party can get relief from the consequences of an interlocutory order, when the case comes to this court upon its merits, no appeal will lie from such order. We conclude, therefore, that the question as to the power and authority of the judge to rescind the orders in question can not be reviewed by this court until the case is here on final appeal, and until then we can express no opinion upon the subject.

Second—Are the orders rescinding the interlocutory orders of the pre-

vious term of a nature to work relator an irreparable injury, and therefore appealable? This is the sole question.

One of the orders rescinded directed that certain facts sworn to by relator be taken for confessed. The other directed the appointment of certain persons as experts to determine and report upon the practicality of a partition in kind of certain property.

Relator contends that these orders of rescission may and will work him an irreparable injury, because—

First—These facts stood in the record, not only proved but confessed, and could not therefore be controverted. The order of rescission destroyed this evidence for relator.

Second—He will be put to useless expenses and costs, and delays in producing and introducing evidence of said confessed facts.

Third—The witnesses by whom the books, etc., might be established, if false or changed entries are produced, or if said books are now suppressed, may no longer exist or be within reach of relator, and thus he be deprived of proof, etc.

We think the correct doctrine on this subject is stated by this court in *Hyde vs. Jenkins*, 6 La. 427, to the effect that, to entitle a party to an appeal from an interlocutory judgment, it is unnecessary that the injury be absolutely irreparable. It suffices if it be such as would be irreparable by the final judgment. If this final decree can not replace the party in the advantageous position which he occupied before the interlocutory judgment, the injury is irreparable.

Testing the relator's claims by these rules, we think they are not tenable, because—

First—This court on the final hearing of this cause, can and will give the relator the benefit of the imputed confessions, if the order therefor was properly and legally taken. The rescinding order does not destroy the evidence, if illegally rendered, or impair the right to offer it on the trial of the cause. Its legality can be questioned on the final hearing, and this is true of the order as to the experts.

Second—The fact that an interlocutory order may occasion some delay, and additional labor and expense, is not surely a sufficient ground for an appeal. If so there would be no end of appeals. The overruling a plea to the jurisdiction, or a plea of *res adjudicata*, or the granting an order of continuance, or a commission to take testimony, and many other orders and decrees, occasion delay, expense, and labor, and yet no one pretends that appeals lie from them. More or less delay is the proverbial attribute of the law—expense and labor necessary incidents, which are supposed to be reimbursed and compensated by the party cast.

Third—The third reason presented by relator seems to us rather a reason why he ought not to desire an appeal. He says that witnesses, by whom he can prove the facts taken for confessed may die. True, but is not that a cogent reason for taking their testimony as soon as possible, and without waiting for the results of the appeal he is seeking? For that would involve months of delay, thereby increasing the chances of death among his witnesses; and if by any chance the appeal sought should be decided against him, and the "rescinding orders" held to be valid, he would then indeed have suffered an irreparable injury, but that injury would have proceeded from his own act. By denying him the appeal we save him these risks. He is safe in the possession of the confessions in question, if the order taking them was legal. No irreparable injury can therefore result; at most he will incur some delay and some additional cost and labor, which as we have seen do not afford cause for appeal.

The writs prayed for are refused.

No. 6698.

STATE EX REL. J. LARIEUX ET AL. VS. THE JUDGE OF THE FIFTH DISTRICT COURT.

This court will not issue a writ of prohibition to a lower court forbidding it to proceed in a case before it, of which it has not jurisdiction, until a plea to its jurisdiction has been filed in the lower court, and overruled by it.

APPPLICATION for a writ of prohibition.

E. K. Washington, for relator.

Robt. Mott, for respondent.

The opinion of the court was delivered by

DEBLANO, J. On the twelfth of June 1877, the Crescent City, Live Stock, Landing and Slaughterhouse Company filed, in the Superior District Court, a suit against John Larieux, one of the relators. In that suit, which was transferred to the Third District Court of this city, the company prays that said Larieux be enjoined from yarding, stabling and slaughtering, within the parish of Orleans, St. Bernard and Jefferson, except in its buildings, on its premises and at its abattoirs, any animals destined for human food.

On the third of July 1877, the injunction thus applied for was refused by the judge of the Third District Court, and, from the decree denying and rejecting its application, the company appealed. That appeal is now pending in the Supreme Court. On the 9th of July, six days after

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the judge's refusal to grant the aforesaid injunction, the company applied to the judge of the Fifth District Court, for an injunction against the said Larieux, which, in substance, is almost identical to that refused by the Third District Court. The manifest object of both is to compel the relators and every butcher, within the limits of the three aforesaid parishes, to pursue their occupation at the place designated by the company's charter.

On the eleventh of July, Larieux appeared in the Fifth District Court, and, through his counsel, moved that the order of injunction granted by said court be revoked and rescinded, on the ground that it was allowed in violation of an act of the Legislature, which provides: "That whenever a suit or judicial proceeding is instituted in any of the courts of the parish of Orleans, in this State, when such court has jurisdiction, all parties to such suits shall be confined exclusively to such court for the trial of all issues or matters that may arise in the course of such litigation, or out of the judgment rendered in such litigation; and no other judge shall have jurisdiction to grant orders of injunction, sequestration, provisional seizure, arrest, prohibition, *quo warranto*, or any other order by which the proceedings in such litigation or judgment rendered thereon, or the property in litigation, or persons of the parties in litigation, shall be stayed or in any manner interfered with or interrupted etc. That no provision in this section shall apply to the Supreme Court or the judges thereof."

The second section of said act provides "that whenever any judge shall grant any order in contravention or in violation of its first section, and the same shall be brought to his knowledge *ex parte* or otherwise, he shall forthwith revoke and annul such order, either in chambers or open court, and cause the officer in charge of the execution of such writ to be notified of such revocation, whose duty it shall be to return such writ at once; and if any judge, who has granted any such orders, and to whom knowledge has been brought that it is in violation of the first aforesaid section, and he fails or refuses to grant an order annulling it, as directed, and it shall be necessary, by writ of prohibition or appeal in such cases, or resorting to any legal remedy to compel him to issue such order, and he is directed to annul the same, as is required by the first section of said act, such judge shall be fined in the sum of two thousand five hundred dollars," etc. Act No. 86 of 1870.

The motion made to revoke and rescind the order obtained from the judge of the Fifth District Court was tried, argued and taken under advisement. Immediately after, and before the decision of his own motion, Larieux applied for a writ of prohibition commanding the aforesaid judge to take no further action in the case. His application is premature:

According to High, "the common-law rule is believed to be generally applicable in this country, and the writ will not go to a subordinate tribunal in a cause, arising out of its jurisdiction until the want of jurisdiction has first been pleaded in the court below and the plea refused; and where there has been no effort made to obtain relief in the court which it is sought to prohibit, the superior courts will refuse to exercise their jurisdiction by this extraordinary remedy. For example, where an injunction has been obtained in direct violation of statute, and without any jurisdiction on the part of the court, prohibition will not be granted to prevent the court from proceeding with the injunction suit, where no application has been made to dissolve the injunction." High, *Extraordinary Legal Remedies*, p. 558-9, No. 773.

There is no doubt that but one tribunal, the Third District Court of this city, could legally have entertained jurisdiction of the controversy pending between Larieux and the company, and that said controversy has passed from the lower to the appellate court. Were it not that his decision has been suspended by the provisional writ of prohibition, the judge of the Fifth District Court would have, we presume, already complied with the imperative mandate of an imperative law and sustained the plea to his jurisdiction. Be this, as it may, until now the parties alone, plaintiff and defendant, have proceeded in this cause, the first in asking the injunction, the other in asking the dissolution of the injunction. The judge has not yet acted, and until he does and evinces a determination to encroach upon and usurp the jurisdiction of the other tribunal, there shall be no cause to interpose our authority.

The rule is, therefore, discharged at relator's costs.

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No. 5455.

A. P. DUMAS VS. ARISTIDE MARY.

The failure of an appellant to obey an order of the lower court to substitute a solvent for an insolvent surety on his appeal bond, will work the dismissal of his appeal.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J.*

A. & W. Voorhies, for plaintiff.

A. Robert, for defendant.

The opinion of the court was delivered by

EGAN, J. The surety upon the appeal bond in this case died insolvent after the transcript was filed in this court. A rule was taken in the court below upon the appellant to show cause why he should not give

Dumas vs. Mary.

new and sufficient surety. The rule was made absolute, and appellant ordered to furnish the required new surety within a delay fixed by the court. He has not complied with the order.

The solvency and sufficiency of the surety on an appeal bond is peculiarly within the province of the court of original jurisdiction. From its order in the premises he has not applied to this court for relief, and the action of the court below is presumed to be regular and based upon sufficient evidence. The motion to dismiss this appeal must prevail. 21 An. 178; 16 An. 192; 19 La. 178; 22 An. 113; 23 An. 714; 25 An. 424.

Although this ground is not expressly taken in the motion we have the less difficulty in dismissing the appeal for the reason that the surety upon the injunction bond was likewise the surety upon the appeal bond. This he could not lawfully be, as he was a necessary party to the appeal. See 18 An. 659.

It is therefore ordered, adjudged, and decreed that the appeal be dismissed at the cost of the appellant.

No. 6724.

STATE EX REL. MARY E. BROWN ET AL. VS. PARISH JUDGE OF IBERVILLE PARISH.

Where a motion in open court for a suspensive appeal has been refused, and the mover, pending the term of court at which his motion was refused, makes no application to this court for relief, he can not obtain a mandamus to compel the successor of the judge who refused his motion, at a subsequent term of the court, to grant the appeal.

It is too late to apply to this court for a mandamus to compel an appeal to be granted, when the term of this court, at which the appeal was asked to be made returnable, has expired, without any effort having been made by the applicant to obtain relief from this tribunal.

APPPLICATION for a writ of mandamus.

Barrow & Pope, for relators.

Respondent for himself.

The opinion of the court was delivered by

EGAN, J. Judgment was rendered in the parish court of Iberville by James L. Cole, then parish judge, on the twelfth of December, 1876, in the partition suit of Julia A. Ventress, individually, etc., vs. Isaac D. Brown et al., heirs of James N. Brown. On the same day the relator moved in open court for an appeal, suspensive or devolutive, which motion was overruled and the appeal refused. The relator asked for no order of prohibition or mandamus against the judge so refusing the

State ex rel. Mary E. Brown vs. Parish Judge of Iberville.

appeal. The term of court expired at which the motion was made and judgment rendered, as did also the term of the judge who refused the order, and he was regularly succeeded by James Crowell, the defendant in these proceedings. The relators do not even allege that they ever applied for any other or subsequent order either to the former or to the present parish judge, nor do they allege any state of facts which placed it beyond their power to seek the relief provided by law to enable them to assert and obtain a suspensive appeal within the time fixed by the statute or to avail themselves of any right growing out of the motion for appeal made by them in open court at the term at which the judgment was rendered. Under this state of facts the defendant Crowell very properly answers that the term of court at which the motion for appeal was made having adjourned *sine die*, the matter had passed beyond his reach. In other words, that it was too late after its adjournment to change the orders made at that term, and that it was not his province at this time to revise the acts and orders of his predecessor in the premises.

Under this state of facts it is apparent that the present parish judge is not in default, and that mandamus will not lie against him. Indeed, he says in his answer that had he been the judge of the court at the time of the motion for appeal he would have granted it. The relators obtained the provisional order of mandamus in these cases on the twenty-fourth of October of the present year. By their own showing it is now too late for a suspensive appeal; the term of this court to which the appeal was asked for has passed without any effort on the part of the relators to correct the alleged error in refusing appeal, and an order could not at this time be granted to have effect *nunc pro tunc* either for suspensive or devolutive appeal; and they could no doubt obtain a devolutive appeal by proper application to the present judge of the court *a qua*, as it is within twelve months.

It is therefore ordered, adjudged, and decreed that the complaint be dismissed and the writ of mandamus be discharged at the cost of the relators.

No. 5417.

JAMES L. FERREE ET AL. VS. WM. P. SMITH.

When the owner of a patented machine sells to another the exclusive right to use, and dispose of the machine within a certain territory, he thereby excludes himself, and all others acting under his authority, from using or selling, within said territory, any other machine, called by a different name, and differing slightly in its construction and method of operation, but which is *substantially* the same machine, performing substantially the same kind of work.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J.*

A. & W. Voorhies, for plaintiffs and appellees.

Hornor & Benedict, for defendant.

The opinion of the court was delivered by

DEBLANC, J. On the fifteenth of August, 1871, William Smith, acting in his own name and as agent of L. M. Rumsey, sold to plaintiffs, James L. Ferree and John R. Davidson, "all the right, title and interest which they had in an invention to drill rock and earth, for which, on the first of June 1869, they obtained a patent from the United States; the right thus transferred to be held and enjoyed to the end of the term for which the patent is granted, and as fully and entirely as then held by the vendors."

In the deed from defendants to plaintiffs, it is expressly stipulated that the privilege thus assigned to the latter shall be exercised by them in only the parish of Pointe Coupee, and that, within the limits of said parish, none but the drove-well referred to in the deed, and none of that description but those to be manufactured and furnished by William Smith shall be used by his transferees.

Under this contract, what were, if not the express, at least the implied obligations of defendants? It certainly was not to enter in competition with their assignees and in the designated locality, either with the patented drill or any other. It was more: they could not fairly advise, assist and encourage others to drill wells in said locality.

Have they done so? One of them, William Smith, manufactured what he seems to consider as two different drove-wells, one which does, and one which does not revolve, as they are driven. He claims that it is the first which he sold to plaintiff, and that he, and any one else, has a perfect right to use, sell and drive the other at any and every place. He so informed James Holmes, who, thereafter, drove, in the parish of Pointe Coupee, several of those non-revolving wells.

Davidson came to the city, spoke to Smith on this subject, mentioned the names of those for whom those wells had been driven, complained that he had advised not to deal with him, that, besides, he had himself sent the machinery and appliances for those wells to Pointe Coupee,

 Ferree vs. Smith.

and Smith answered that he would continue to do so. He evidently relies on the difference existing between the two wells and indicated in his and his witnesses' declarations,. Whatever may be that difference, and it is very slight, Smith has violated his contract of the fifteenth of August.

"In determining the question of infringement, we are not to determine about similarities or differences, merely by the names of things, but are to look to the machines or several devices or elements in the light of what they do or what office or function they perform and how they perform it, and to find that a thing is substantially the same as another, if it performs substantially the same function in substantially the same way to obtain the same result." *Union Refinery vs. Matthieson*, 2 Fish. 602.

"It makes no matter what additions to or modifications of a patentee's invention a defendant may have made: if he has taken what belonged to the patentee he has infringed, although with his improvement the original machine or device may be much more useful." *Howe vs. Morton*, 1 Fish. 587.

In their answer to the appeal, plaintiffs pray that the judgment of the lower court be amended and they allowed, as damages, the sum of five thousand dollars. The facts disclosed on the trial do not authorize either the amendment or reversal of said judgment, which is affirmed with costs.

Rehearing refused.

No. 5416.

GORDON & GOMILLA VS. WRIGHT & CLARK.

Before a third person can sue on a policy of insurance to which he is not a party, no matter what his interest in the insured property may be, it must be shown that the policy was assigned to him with the written consent of the assurer, and that the property assured had been assured as his property.

A claim not set up in the pleadings will not be allowed by this court.

A consignee who fails to insure property shipped to him and received by him, after having been instructed to insure by the shipper, is liable for any loss resulting from his not having insured.

A consignee who has insured a consignor's property in his, consignee's, name, and fails to collect the insurance money, becomes liable himself as insurer.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J.*

Randolph, Singleton & Browne, for plaintiffs and appellees.

H. H. Bryan, for defendants.

The opinion of the court was delivered by

SPENCER, J. Plaintiffs, a commercial firm of New Orleans, bring this suit by attachment against defendants, a commercial firm of Jefferson, Texas, for \$1629 41, with five per cent interest from first March, 1872. They allege that in the latter part of 1871, and early in January, 1872, they consigned to the defendants for sale 500 barrels of flour, which defendants duly received. That defendants refuse and neglect to account for a portion of said flour, by reason of its having, while in their warehouse at Jefferson, been destroyed by fire in the month of February, 1872. That said defendants were instructed to insure said flour. That it was in the usual course of business, their duty to insure it—that they had insured similar shipments made to them by petitioners or at least had charged petitioners with the premiums of insurance, which in every instance were duly paid by petitioners—and that said defendants had charged petitioners with the premiums of insurance on this particular lot of flour—that said defendants are liable for 167 barrels of flour worth \$1472 and for damages done to other barrels to the amount of \$354 75, less a credit of \$197 34, leaving due \$1629 41. They pray for attachment and garnishment.

The defendants answer in substance, that they were not the agents of plaintiffs; that if they were they were not bound to insure; that in point of fact they did insure and that they are not liable for said loss.

There was judgment for plaintiffs as prayed for, and defendants appeal.

The evidence satisfies us that plaintiffs shipped the flour to defendants for sale, and that defendants received it, and stored it in their warehouse. That defendants were in the habit of insuring the plaintiffs' consignments, charging insurance premiums therefor, which were always paid by plaintiffs. That in point of fact they (the defendants) had this particular flour entered as insured under their open policy with "the Texas Banking and Insurance Company" and charged plaintiffs with the premiums thereon. This policy was payable only to the defendants or their assignees. The insurance attempted was effected in their name, and not in that of plaintiffs, who could not have maintained an action on the policy. The insurance officers swear that defendants overloaded their policy, which was for only ten thousand dollars, and that the company had paid them all it owed under the policy.

Under this state of facts the right of plaintiffs to recover is too plain for discussion. If the defendants did insure, it was in their own name, and it was their duty to collect. If they did not, it was their neglect of a plain duty which makes themselves liable as insurers. They can not avoid this liability by pretending that plaintiffs had more especially charged one of their (defendants') clerks with the sale of this flour. There

is no sufficient proof of that fact, and there is no pretense that defendants were not the consignees.

It is therefore ordered, adjudged and decreed that the judgment appealed from be affirmed with costs of both courts.

Marr, J., recused.

ON REHEARING.

The opinion of the court was delivered by

DEBLANC, J. In the brief which he filed a few months before his death, the able, unpretending and regretted attorney who then represented the defendants, based his application for a rehearing of this cause, on the ground that the policy of insurance, though issued in his client's name, was procured for the benefit of plaintiffs, and that they could and should have sued thereon.

He has quoted from the reports of several States to establish that "when a promise is made to one for the benefit of another, he for whose benefit it is made may bring an action for its breach." This, assuredly, we have never denied, for that plain doctrine is consecrated by our legislation and jurisprudence. Here, that doctrine is a law, and the action given for the breach of such a promise is the equitable action. C. P. 35.

In our previous opinion, what did we maintain? That the insurance was effected in defendants' name, that, in substance as in form, the policy is payable but to them or their assigns, and that, as plaintiffs could not legally have sued thereon, it was defendants' duty, we should have said their right, to claim, sue for and collect an indebtedness, the evidence of which ever was and still remains in their hands; but we have neither entertained, nor published the more than extravagant proposition "that an agent, who makes a contract for his principal is bound to enforce that contract, even by litigation."

The policy is before us, and we have to read it as it is written, to construe it according to its stipulations. By its terms, who were insured? Wright & Clark alone. Against what and for what amount were they insured? Against fire and for any amount not exceeding ten thousand dollars. Whose property the policy was intended to cover? Their own and any property held by them on trust or on commission.

To have enabled plaintiffs to bring an action on that policy, three conditions had to be complied with:

First—The policy would have had to be assigned to them, and it could have been so assigned but by written consent of the corporation. That consent was neither asked, nor given.

Gordon & Gomilla vs. Wright & Clark.

Second—They would have had to allege and prove that the property held on commission for them had been insured as such. This was not done.

Third—They could have successfully sued but on a policy not exceeding ten thousand dollars, and defendants'—this is not disputed—did exceed that amount and was overloaded.

Two important facts were sworn to by the general agent of the insurance company and they stand uncontradicted. He did not know Gordon & Gomilla in connection with this policy, nor that any flour of others was destroyed by the fire: but, so far as he knows, what was due to Wright & Clark, under the policy, had been settled and paid.

Under these circumstances, are they not liable for the full value of the flour which was entirely destroyed, and for the injury done to the balance? In that respect, our conviction was and still is that they are bound. So we held and so we hold.

We have found, in our former decree, an error of fact, and that error we hasten to correct: it is as to the value placed by us and by the lower court on a portion of the flour, the Alvarado, for which we should have allowed, not nine dollars as we have done for the Figaro, the best of the two brands, but only eight dollars and a half, as there was, between those brands and according to Gomilla's own statement, a difference of fifty cents per barrel. That excess was charged on ninety-one barrels and should be deducted from plaintiffs' claim.

In their printed argument, defendants contend that they should also be allowed a commission of two and a half per cent on any balance for which they may be held liable, as that balance shall represent the full value of the property consigned to them, and be, we must presume, equal to the amount of the proceeds which would have been realized from the sale of the flour. That commission is not claimed in their pleadings and can not be allowed.

It is therefore ordered that the former decree of this court be set aside, and the judgment of the lower court avoided, annulled and reversed.

It is further ordered, adjudged and decreed that there be judgment in favor of plaintiffs, Gordon & Gomilla, and against defendants, the firm of Wright & Clark, and against Mark H. Wright and P. B. Clark, the individual members of said firm, *in solido*, for the sum of fifteen hundred and eighty three dollars and ninety-one cents, with legal interest thereon from judicial demand, with privilege on the property attached by plaintiffs; the costs of the appeal to be paid by Gordon & Gomilla, those of the lower court by defendants.

Mr. Justice Marr took no part in this decision.

No. 6727.

STATE EX REL. FUQUA, TUTOR, vs. F. D. BRAME, SPECIAL JUDGE.

29	816
1122	87

On the recusation of a district judge in a particular case, an attorney at law can not be compelled to accept the appointment of judge *ad hoc*, to try the case in place of the recused judge; nor to act, even after having accepted the appointment, and passed on some preliminary questions in the case.

A PPLICATION for a mandamus.

Wedge & Moore, Calhoun Fluker, and Labatt & Clinton, for relator.
Respondent for himself.

The opinion of the court was delivered by

SPENCER, J. Certain suits are pending in the district court of East Feliciana between the relators and K. A. Cross. The judge of that court having been of counsel previous to his election, recused himself, and appointed the defendant Brame, an attorney of that court, special judge to try them. Brame accepted the appointment, took the oath as judge *ad hoc*, and tried some preliminary questions and exceptions therein. Subsequently he stated from the bench, that, while he had no interest in the suits, nor had been of counsel, nor was related within the fourth degree to any of the parties, he was a personal friend of Mr. Cross, and had some family relationship with parties to the suit. He therefore declined to sit longer as judge *ad hoc*, and vacated the bench, refusing to proceed with the trial.

Relators thereupon apply to this court for a mandamus to compel him to proceed as judge *ad hoc* to the trial.

The defendant answers in substance to the rule *nisi*—

First—That article ninety of the constitution does not compel an attorney, not a judge of any court, to abandon his own business and assume against his will the office and responsibilities of a judge in any court or case.

Second—That he has been appointed against his will, during the present term, judge *ad hoc* to try at least half a dozen cases like the present and that “the said appointments are attended with neither honor, nor profit, and are a nuisance.”

Third—That such compulsory service would be involuntary servitude, in violation of article thirteen of the constitution of the United States.

Fourth—That act No. 70 of 1876 provides for the disposal of cases like the present, where no attorney possessing the requisite qualifications will serve as judge *ad hoc*.

The course of the defendant looks very much like trifling with serious interests and his answer is wanting in that gravity which ought to characterize judicial proceedings. He should not have accepted unless he

intended doing his duty. But we know no law by which we can compel him to do so. The ninetieth article of the constitution requires the judge to appoint an attorney, but does not make it *obligatory* on the attorney to accept, or having accepted, to compel him to serve. If he be considered as an officer, a judge, still he has the right to resign, provided he does not do so *inopportunately* and to the defeat of the rights of others. His action in this case amounts to a resignation; and although it appears by the certificate of the district judge that there is no other attorney at that bar who can be appointed, we do not think that the relators are remediless. The act No. 70 of 1876 provides, we think, specifically for their case, and enables them to have their cases tried by transfer to another district.

The mandamus is therefore refused with costs to be paid by relators.

No. 6589.

JAMES J. O'HARA VS. MRS. E. BOOTH AND NICHOLAS CONNELL.

When an owner of property within this State, who is absent from the State, is sued, in a court, within whose jurisdiction the property is situated, he may be brought into court and have a judgment *in rem* rendered against him, either by attaching the property, or by having a curator *ad hoc* appointed to represent him. Service of citation on such curator is sufficient.

The purchaser of unmortgaged property, sold under the decree of a court of competent jurisdiction, rendered in a suit where the proper parties were duly represented, can not have his title to the property assailed in any collateral manner; or, on the ground of irregularities in the legal proceedings which only the defendant in the proceedings could plead.

The adjudication of property sold under execution, at the suit of a privilege creditor, for a price less than the amount of a *prior* privilege is utterly void.

Seizure of property under the execution of a valid judgment, gives a lien on the property, superior to any privilege recorded against it subsequent to the seizure.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J.*

Hornor & Benedict, for plaintiff and appellee.

T. Gilmore & Sons, for Connell.

The opinion of the court was delivered by

DEBLANC, J. The defendant, Sarah E. Booth, was the owner of the square of ground bounded by Liberty, Howard, Washington and Fourth streets, in the city of New Orleans.

Nicholas Connell, as transferee of one J. Fallon, and O'Hara, the plaintiff, were both creditors of Mrs. Booth for the cost of laying sidewalks, curbs and gutters, under contracts with the city—Fallon on Liberty street, O'Hara on Howard street.

Fallon's privilege was recorded on the fourth of March 1872, O'Hara's on the ninth of March 1876.

Connell sued on the claim transferred to him by Fallon, and, on the tenth of May 1875, obtained judgment against Mrs. Booth for \$669 71, with recognition of his privilege on the lot of ground above described.

On this judgment execution issued and was levied in July 1875. The property subject to Connell's privilege was seized, advertised for sale, and adjudicated to him for \$1600, but on account of alleged informalities in the proceedings, said property was re-advertised, and, on the fifteenth of April 1876, re-adjudicated to Connell, for \$300.

On the twenty-fifth of March 1876, O'Hara brought suit against Mrs. Booth and Connell, on his herein-mentioned claim, and, on the third of May, obtained judgment against Mrs. Booth alone, for \$820 28, with recognition of his privilege. His demand against Connell was rejected.

It was after the first and before the second adjudication of the property to Connell, and while said property was under his, said Connell's seizure, that O'Hara's privilege was recorded and his judgment obtained.

O'Hara issued execution upon his judgment against Mrs. Booth, and caused to be seized, as belonging to her, the lot which, already, had been sold to Connell. The sale, under O'Hara's execution, took place on the fifth of August 1876, and, at that sale, the property twice before adjudicated to Connell, was purchased for \$100 by A. Hero, Jr.

It was after this last adjudication, that O'Hara filed the rule in and by which Connell was called upon to show cause why the privilege securing the claim transferred to him by Fallon should not be cancelled. To this rule, Connell excepted on the grounds that such issues as it presented could not be tried during the court's vacation, and that his rights on the property could not thus be collaterally attacked.

In answer to these exceptions, O'Hara's counsel contend, in their printed argument—

1. That Fallon's privilege was not recorded at the date fixed by the 3274th article of the Civil Code, and that, under a decision of this court reported at page seven of the twenty-seventh Annual, he was not entitled to any privilege whatsoever.

2. That the judgment of Connell, as transferee of Fallon, is an absolute nullity, for the reason that, having no privilege, he had no right to proceed against Mrs. Booth, an absentee, by the appointment of a curator *ad hoc*.

3. That said curator was appointed without a previous citation to Mrs. Booth, before it had been shown that she was an absentee, and that he, said curator—though it does not appear that he was cited—answered Connell's demand by a general denial, upon which, on the tenth of May 1875, judgment was rendered against Mrs. Booth.

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Fallon's claim against Mrs. Booth is not disputed; its rank alone is contested. That claim, its amount and its character are recognized by the judgment of a competent court—that judgment was executed in the presence of O'Hara; he protested, but irregularly, against the execution under which Connell acquired title to the property, on which they both allege and tacitly admit they had a privilege.

Could O'Hara, disregarding the title so acquired, proceed to seize and sell as still belonging to Mrs. Booth, the property which, to his knowledge, had passed from Mrs. Booth to Connell? He seems to think that he could. In this, he is mistaken. Mrs. Booth was absent from and owned property in the State; she was, beyond any doubt, indebted to Connell, and, when sued by the latter, was properly represented by a curator *ad hoc*, on whom, as such, citation was served on the first of April 1874.

There may be, in the proceedings which are the basis of Connell's title, a slight inobservance of the rigid course which should be pursued to bind absentees and justify the sale of their property; but, if they do exist, most of the irregularities complained of, considering the evidence now before us, would only authorize those defenses and actions personal to the absentee, and do not import that absolute nullity, which, to be pronounced by the court, needs but be referred to and suggested, and which, at any time and under all circumstances, may be urged by any interested party.

The curator *ad hoc* may seem to have been a little too hasty in filing his answer; unexplained, that haste may leave the impression that he acted before communicating with Mrs. Booth; but, had he corresponded with her, would she have imparted any information he had not, and would any additional information have changed the form and substance of the curator's answer? That is not probable. He may have had reasons to believe that, in the interest of the absentee, to avoid the useless expenses of a litigation which could be but uselessly prolonged, the immediate trial of a suit on an indisputable and undisputed claim was as proper as desirable. This did, nor could, in no way, expose or affect the rights of O'Hara.

Mrs. Booth might, with what result, we are not prepared to decide, assail as apparently irregular and suspicious two successive adjudications of her property to the same party, under the same execution; the first for sixteen hundred dollars, the last for only three hundred. That right, in a proper pleading and under proper allegations, her creditor might invoke and exercise; but he neither could, nor can, by mere suggestions in argument, ask of any court to ignore the existence of a title, derived from the execution of a judgment rendered after citation, the joining of issue, a trial, and the uncontradicted proof, if not of Connell's

claim and privilege, at least of the as yet undenied correctness of his claim.

Instead of contending for a preference over the price of either the first or the second sale, O'Hara has chosen to proceed directly against the property, as if it had neither been seized nor sold under Connell's execution; he has chosen to seize after an executed seizure, to sell after a previous sale, to acquire after the title thus acquired had, to his knowledge, passed from the seized debtor to one of her creditors—and, in its present form, his action can not prevail.

For at least two reasons, plaintiff's demand should be disallowed:

1. If, at the date of the sale made under his execution, the title to the property was in Mrs. Booth, Hero's bid of one hundred dollars was entirely insufficient to discharge the prior privileges and mortgages bearing on said property, and its adjudication at that price was absolutely void. C. P. 684.

2. Whether Fallon's transferred claim was or was not properly certified and recorded, Connell, by his seizure, which antedates the recording of the evidence of O'Hara's contract, was invested with a privilege which entitled him to be paid by preference to all other creditors of Mrs. Booth, out of the price of the property seized. C. P. 722; 27 An. 290.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be and it is hereby annulled, avoided and reversed, and plaintiff's rule dismissed at his costs in both courts.

ON APPLICATION FOR REHEARING.

The opinion of the court was delivered by

SPENCER, J. Even if the plaintiff's rights are of the character represented by him, and even if the defendant Connell had no privilege, still we could give him no relief under the form of action pursued in this case.

If we treat and consider Connell's judgment as but an ordinary debt *without privilege*, still the seizure and sale of Mrs. Booth's property thereunder undoubtedly had the effect of transferring that property to him; and if it is true as asserted by plaintiff that he had thereon prior to the sale a valid and subsisting privilege, superior to any right of Connell, that privilege was not divested by the sale. We can not treat that sale as a nullity. The law is too plain for that. Where the sale of a debtor's property is *real* and not *simulated*, and where a creditor has not a privilege or mortgage containing the pact *de non alienando*, the creditor can not disregard the sale and seize the property. His only

remedy, if an ordinary creditor, is the regular *revocatory* action, with allegation and proof of the debtor's insolvency—if a mortgage or privileged creditor, he may proceed by the *hypothecary* action. Now it is not pretended that the rule in this case comes under either of these forms of action; and plaintiff must therefore fail, unless the judgment of Connell, and therefore the proceedings under it, were absolutely and radically null. The plaintiff contends that they were, first because Mrs. Booth was represented by a curator *ad hoc* upon mere allegation of her being an absentee; and second because, an absentee can only be brought into court by attachment or seizure of his property, if the seizing creditor has no privilege. It will be time enough to discuss the question whether Mrs. Booth was or was not an absentee, when Connell's judgment is attacked by her on that ground, or by her creditors, in a proper form of action. One thing is clear and that is, that if she was in point of fact an absentee, then the appointment of a curator *ad hoc* to represent her, could not be invalidated because made by the judge on insufficient proof or even without proof. We must presume that the judge did his duty, and we think this record shows that he did, for throughout this litigation she is treated as an absentee, even by the plaintiff himself. Nor is it true under the jurisprudence of this State as now settled, that an absentee owning property in this State can only be brought into court by the attachment or seizure of his property, when the creditor has no privilege.

The rule as now settled (and we believe correctly) is that, where an absentee owns property in this State, *any creditor* may bring him into court, *quoad* that property, by the appointment of a curator *ad hoc*, and that the judgment rendered contradictorily with the curator may be executed on that property. The judgment is good *in rem*, but not *in personam*. Of course it would have to appear in the pleadings and proof that the absentee owned property within the jurisdiction of the court.

In conclusion if Mrs. Booth was and is insolvent, and the judgment of Connell a fraud upon her other creditors, the revocatory action must be resorted to. If the complaining creditor has a mortgage or privilege upon the property alienated, he may resort to the hypothecary action. If the sale is a simulation, or if the creditor holds a mortgage or privilege under the pact *de non alienando*, he may disregard the sale and seize, but not otherwise. Plaintiff does not allege or pretend himself to be within these exceptions.

Rehearing is refused.

Borde vs. Mrs. William Erskine.

No. 6675.

JOACHIM BORDE VS. MRS. WILLIAM ERSKINE ET AL.

29	822
111	944
111	949

When an additional party is made to an appeal after the execution of the appeal bond in favor of the clerk, a new bond is not necessary.

On such a bond all parties to the appeal, no matter at what stage of the proceedings they may have become parties, have their recourse.

Citation of appeal should be served on a resident party in person, or at his domicile, not on his attorney. But if an improper citation has been made by the sheriff, not shown to have been caused by the fault of the appellant, it will not justify the dismissal of the appeal.

The filing of properly certified copies of missing parts of a transcript, absent by fault of the clerk of the lower court, will be allowed, although it is not the method prescribed for perfecting an incomplete record.

A PPEAL from the Second Judicial District Court, parish of Plaquemines. *Pardee, J.*

E. Bermudez, for plaintiff in rule.

H. L. Lazarus, for defendant in rule.

E. H. McCaleb, for defendants.

Sambola & Ducros, for Mrs. Fernandez, appellant.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

MANNING, C. J. The plaintiff instituted a suit for the partition of a plantation owned by him in common with the defendants, in which there was rendered a judgment for a partition by licitation. There was a sale, and Mrs. Carmen Fernandez was the purchaser. In March, 1877, Boarde, the plaintiff, alleging that the property was incumbered with certain mortgages which he describes, and that Mrs. Fernandez was the adjudicatee, and that their erasure is necessary to give her a clear title, took a rule to shew cause why they should not be erased. The rule was served on all the joint owners, and upon the under tutor to two minors who were defendants, whose mother and tutrix was a co-defendant, and also upon the mortgagees, except one. On trial, the rule was discharged, and Boarde appealed. He furnished no bond, and abandoned the appeal.

In April the purchaser prayed an appeal by petition, making all the mortgagees and owners parties, except Boarde, which was granted upon a bond of two hundred and fifty dollars, which was duly executed with surety. Subsequently, upon discovering that Boarde had been omitted, she filed a supplemental petition supplying the omission, and there was an order making him a party, and he was cited. No additional bond was given.

The motion to dismiss is based on several grounds. One of them is that the failure to execute a new and additional bond vitiates the appeal

Borde vs. Mrs. William Erskine.

as to Boarde, who is a necessary party. This is untenable. The bond is in favor of the clerk, and all parties to the appeal can recover on it. And besides if Boarde himself does not complain of the want of an additional bond, it is not for the appellants to complain for him. The circumstance that Boarde's name was not included in the original petition for appeal would have been fatal, had the defect not been cured by the supplemental petition and citation upon it. We are referred to several decisions to the effect that those only are parties to the appeal whose names are in the bond. All of them are under the old law which required the insertion in the appeal bond of all the parties, a provision which sometimes was so incapable of sure fulfillment that the legislature tardily, but effectually, removed the difficulty by substituting the name of the clerk, and authorizing the parties to avail themselves of it.

Another ground for dismissal is the want of proper citation to the under tutor. He was a party to the partition suit, and was regularly cited therein. The citation of appeal was served on his attorney, which is the proper mode of service on a non-resident. Code of Practice, art. 582. But he is a resident of the State, and was at that time, if the sheriff's return be correct, absent. The service should have been at his domicile. *Ratliff vs. Creditors*, 14 La. 292. Under the act of 1839, an appeal will not be dismissed on the ground of irregularity in the service of citation, if it is not imputable to the appellant. We think that statute protects the appellant in this case. She alleged in her petition of appeal that the under tutor was a resident of Orleans, and prayed for his citation. The sheriff should have known how to cite him. There is nothing before us to shew that the appellant, or even her attorney, misdirected the sheriff, and by her own fault caused an improper service to be made.

Another objection is urged that the record is incomplete, and the appellant has attempted to supply its deficiencies by filing along with it a copy of a missing paper. The clerk also makes a supplemental certificate as to some omitted words in the transcript. These omissions are attributable to the clerk, and should not prejudice the appellant. The proper and regular mode of perfecting the transcript is by a writ of certiorari, but as was said in *Baltimore v. Parlange*, it is useless to order the writ when certified copies of the missing documents have been filed. 25 Annual, 335.

The facility for dismissing appeals that formerly existed, and of which parties constantly availed themselves to the great detriment of substantial justice, has been restricted by the wise substitution of an officer to the names of the litigants in the appeal bond, so that an appeal by motion can rarely be dismissed for technical objections. It would be

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an equally wise amendment of the law, if the process of taking and serving an appeal by petition were simplified by some equally effectual means.

The motion to dismiss is denied, and the case is continued with leave to the appellant to have the under tutor properly cited.

No. 6409.

STATE VS. T. J. NEWHOUSE AND A. NEWHOUSE.

In the selection of the persons from whom the regular juries shall be drawn for the trial of cases in the Superior Criminal Court for the parish of Orleans, the jury commissioners appointed under the law to make the selection, can not delegate that duty to any other person.

The jury commissioners must themselves make the selection, and *must* make it from all the qualified voters of the parish of Orleans.

Their mere approval of a selection made by some one else, can impart no validity to the selection.

A jury commissioner who has accepted another office, and qualified in it, is thenceforth constitutionally disqualified from serving as a jury commissioner.

A PPEAL from the Superior Criminal Court. *Steele, J.*

H. N. Ogden, Attorney General, for the State.

Cullom & Castellanos, for T. J. Newhouse, defendant and appellant.

The opinion of the court was delivered by

SPENCER, J. The defendants were indicted, and tried at the April term 1876 of the Superior Criminal Court, for murder. The verdict of the jury was not guilty as to A. Newhouse and guilty of manslaughter as to T. J. Newhouse, who was accordingly sentenced to twenty years hard labor. He appeals and presents various grounds for reversal of said verdict and sentence. We shall notice but two of them.

The fifth section of act No. 124 of 1874 provides:

“Be it further enacted, etc., That on and after the first day of April, 1874, all grand and petit juries in the district courts, civil and criminal, for the parish of Orleans, shall be drawn pursuant to the provisions of this act, as follows: There shall be two jury commissioners, to be selected from the qualified voters of the parish of Orleans, and appointed by the Governor, who shall hold their offices and be removable at the pleasure of the Governor. The commissioners shall receive for their services five hundred dollars, each, per annum, payable quarterly by the city of New Orleans. They shall select impartially from the citizens of the parish of Orleans having the qualifications requisite to register as voters, the names of not less than five hundred good and competent.

29	894
46	1275
39	824
51	1319
51	1401
29	824
1118	796

men, a list of whose names shall be made out and returned certified under their hands to the clerk of the Superior Criminal Court, to be filed by him in his office; said list shall be kept complete and supplemented from time to time. Each of the names on said list, and all supplemental lists shall be written out by said clerk on a separate slip of paper, together with the place of residence of each person, and the slips of paper on which shall be written the names and places of residence of persons on the said list, shall be placed in a box or wheel to be kept for that purpose by the sheriff of the court, and ten days before the expiration of every month in which the said Superior Criminal Court shall hold its sessions, the said commissioners together with the criminal sheriff, shall proceed to draw from said box or wheel not less than forty-eight names, and the persons whose names shall be so drawn, shall constitute the petit jury for the month or session of the court succeeding such drawing," etc.

Before proceeding to trial the accused challenged the array of petit jurors, and moved to quash and set aside the venire, on various grounds, among which were these:

First—That the names from which the venire was drawn and out of which the petit jury was composed, were not selected by the jury commissioners, but that a list of over two hundred names was furnished by one Lionel Adams to said commissioners, and said names were put into the wheel from which said venire was drawn.

Second—That in the said wheel at the time said venire was drawn, there were names of persons selected by James Lewis and Smallwood as jury commissioners, at a time when said Lewis was not a jury commissioner, he having months before resigned said office and accepted that of police commissioner, both offices being of trust and profit.

Both of these objections were we think clearly shown to be true in point of fact. It seems that the commissioners to lighten their labors asked Adams to furnish them a list of two or three hundred names for the jury wheel, which he did. The commissioners in their testimony state that they looked over and approved this list after Adams prepared it. The district judge was of opinion that this was a substantial compliance with the statute and that the commissioners by approving, made the list their own selection. We do not think so. To so hold would be equivalent to affirming that the commissioners could act by proxy or deputy in the performance of their very important and grave duties. Nothing in the statute justifies such an inference. Much less could their functions be performed by a person like Mr. Adams, who was, as it were, a mere bystander, under none of the obligations of an officer, or even of an agent or proxy. It is manifest that there would and could be no security for the accused against packed juries, if they be selected in this loose

way. The intent of the law was that two responsible and competent men should, under the appointment of the Governor and under the sanction of an oath, select *from all the voters* of the parish, a list of persons to serve as jurors; that they should inspect and select from the names of all the voters, and not simply *inspect and approve* what might be "a cut and dried" list of two or three hundred names. Such a system is too liable to abuse to be tolerated or sanctioned by courts charged with the lives and liberties of the citizen.

It seems that James Lewis was one of the jury commissioners up to August 1875, when he tendered his resignation and was appointed a police commissioner by the Governor, with a salary of \$2000 per annum. His salary as jury commissioner was five hundred dollars per annum. He in August 1875 took the oath, and qualified as police commissioner and entered fully upon the duties of his new office. But as the Governor did not appoint his successor as jury commissioner he continued to act as such also up to and including February 1876, drawing the salary of both offices.

The 117th article of the constitution declares that "no person shall hold or exercise, at the same time, more than one office of trust or profit, except that of justice of the peace or notary public."

In the case of the People vs. Carrique 2 Hill 93 the Court of Errors and Appeals of New York held: "The appointment of a person to an office incompatible with one held by him is valid and he has a right of election between the two. If he accepts, take the oath and enter on the duties of the second office, the first is absolutely determined."

The constitution declares all offices of trust or profit incompatible with each other, when held by the same person, except one of them be justice of the peace or notary public.

By accepting and entering upon the duties of the office of police commissioner James Lewis ceased, *ipso facto*, to be a jury commissioner. And it appearing that the wheel from which the venire in this case was drawn, did, at the time of said drawing, contain the names of persons placed there by James Lewis after he ceased to be a commissioner, the venire was unlawful.

Article 122 of the constitution, directing that all officers "shall continue in the discharge of their duties, until their successors are qualified," has no application to a case like this, where the office has been absolutely vacated. The absurdity of such an application of it, will be made manifest by illustration: Should the Chief Justice of this court be elected Governor, could he fill both places until he saw proper to appoint his own successor on this bench? We conclude therefore that the challenge of the array and the motion to quash the venire, *made before trial and in limine*, should have been sustained.

It is therefore ordered adjudged and decreed, that the verdict and sentence appealed from be set aside and annulled and it is further ordered that this cause be remanded to the court *a qua* for a new trial, according to law.

No. 5786.

HEIRS OF GUTURREZ VS. B. & W. CRONER ET AL.

An appeal bond given for the full amount required by law, but in which two, or more sureties bind themselves, each for a designated part of that amount, is a good and legal bond.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J.*

George L. Bright, for plaintiff and appellee.

Cotton & Levy, for defendants.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

MARR, J. In this case each of the two sureties bound himself for one half of the amount of the appeal bond. Appellees move to dismiss the appeal on the ground that the law requires the sureties to bind themselves, each, for the whole amount.

There might have been some foundation for such a motion under the Code of Practice, article 575, as originally promulgated. The English text, which is merely a translation of the original compilation in French, required the appellant to give his obligation "with a good and solvent security;" and the corresponding French text is, "*avec le cautionnement d'une personne bonne et solvable.*"

In the amendments to this article the phraseology is changed so as to read: "with good and solvent security." Acts of 1868, p. 167; 1869, p. 11; Revised Statutes, 1870, sections 43, 567, 1921; Revised Code of Practice, article 575.

"Security," the *thing*, ought not to be used as the synonym of "surety," the *person*. The "security," which the law requires, must be a single obligation: there is no good reason why there may not be several sureties who bind themselves, in the aggregate, for the entire amount, each binding himself for part only of that amount. Where the bond is for a large amount, better "security" would be afforded by a number of sureties, each having ample means to meet that part of the obligation for which he binds himself, than by a single "surety," whose death or

 Heirs of Gutierrez vs. B. & W. Croner.

insolvency, which might occur at any time, might either greatly impair or even destroy the value of the "security."

Our predecessors decided that appeal bonds in which there were several sureties, each binding himself for part only of the aggregate amount, were sufficient. 21 An. 443; *ib.* 730; 22 An. 124. These decisions are in conformity with our views of the law; and they have been followed in practice since 1869.

The motion to dismiss is overruled, with costs.

No. 5385.

ANDREAS RICHOUX vs. MAYER BROS.

A principal who employs an agent to do a legal thing, is not liable in damages for any illegal act of the agent done in the execution of the mandate, to which the principal was not accessory, or privy.

A PPEAL from the Fifth District Court, parish of Orleans. *Cullom, J.*
Trial by jury.

Hornor & Benedict and *F. W. Baker*, for plaintiff and appellant.
James H. Grover, for defendant.

The opinion of the court was delivered by

SPENCER, J. This is an action for \$10,000 damages for malicious arrest. Defendants were judgment creditors of plaintiff for some \$800. Being unable to find property they employed Pecora and two other detectives to hunt it up, promising them \$400 if they found property to satisfy the writ. It seems the plaintiff was a Havana lottery ticket vendor and these detectives got him arrested on a charge for unlawfully selling them. The affidavit was made by one James Lawrence, a gambler. Plaintiff was taken to the police station and his valuables, consisting of watch, chain, \$100 in currency, two checks, and some lottery tickets were taken into custody, and from his person, by the prison officials, and deposited with their property clerk. Thereupon a deputy sheriff levied a *feri facias* upon them under the judgment of *Mayer Bros. vs. Richoux*. Plaintiff was after about two hours bonded out and on next day the Fifth District Court ordered the sheriff to return to plaintiff his effects, which was done. No one appearing to prosecute the plaintiff, the charge was dismissed. Thereupon he brings this suit which was tried by jury, and there were verdict and judgment for defendants. Plaintiff appeals.

The evidence satisfies us as it did the jury that the defendants were not privy to and did not authorize, or know of this arrest. They are not responsible for the illegal and tortious acts of the detectives, who

Richoux vs. Mayer Bros.

were employed to find property of plaintiff for seizure under defendants' judgment. There was nothing wrong in such employment. And surely it did not authorize the employees to do the wrongful act complained of.

The judgment is affirmed with costs of both courts.

No. 5438.

MARY DUNCAN VS. MICHAEL DUNCAN.

Parol evidence is not admissible to prove an acknowledgment of, and promise to pay a debt, after the debt has become prescribed.

Prescription will not be suspended on account of the absence of the creditor from the domicile of the debtor, when it appears that it was in the power of the creditor to reach the domicile, and there bring suit in time to avoid the prescription of his debt.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch*, J. Trial by jury.

Belden & Handlin, for plaintiff and appellee.

Foley & Buisson, for defendant.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

EGAN, J. The motion to dismiss this appeal, filed on November 9, 1877, is upon the identical ground taken in a former motion to dismiss, filed November 12, 1875, which was overruled by our predecessors. The appellee can not be permitted thus to revive an issue already decided against him. The motion to dismiss is overruled.

ON THE MERITS.

The plaintiff sued for \$1490, money alleged to have been loaned to the defendant, in 1857 and 1858. The defendant pleads a general denial and the prescriptions of three, five, and ten years. There is a mass of contradictory, and (as the plaintiff has chosen her action) irrelevant testimony in the record, which it is unnecessary, therefore, to consider in the present case. The transcript has been made up with culpable carelessness, and displays frequent and evident errors. There is, however, evidence enough in it to correct the principal errors, and to enable us to adjudicate the case, and we shall proceed to do so.

The plaintiff relies mainly upon two drafts or checks of the defendant, the dates of which are both erroneously given in the record, but are sufficiently shown by the evidence of plaintiff herself and other witnesses, to inform us that the first, that on the Bank of James Robb, was given some time in 1858, and the last, that on the Merchants' Bank, some time in 1859, probably in February of that year. These drafts are both for

29	829
51	1039

29	829
121	688

Mary Duncan vs. Michael Duncan.

the same amount, which is precisely that sued for, \$1490, and the latter is admitted by the plaintiff, and otherwise shown to have been given, in lieu of the former, the bank of James Robb having been merged in and succeeded by the Merchants' Bank. In June, 1860, the plaintiff went to Ireland to visit her relations, and *took the drafts or checks with her*, without having presented either of them for payment until her return to New Orleans, in November, 1868, when she presented the later check, that on the Merchants' Bank, and was answered that there were no funds to meet it. Both checks were payable to her order, and drawn by the defendant. It is unnecessary to consider the effect, if any, of the late civil war upon the rights of the parties to this litigation in regard to the matter of prescription; as to whether this be considered an action for money loaned, which the plaintiff has chosen to make it, and by which she is bound, or on the check of the defendant, which seems only to have been introduced and relied upon of *evidence of the alleged loan*.

There was no inability on the part of the plaintiff to reach the city of New Orleans (her own domicile and that of the defendant all the time), and to have instituted suit in ample time to have avoided the effect of any prescription applicable to either action. Neither can she be considered to have presented the check within a reasonable time, as she might have done, either before or after the close of the war. It is, however, urged that the defendant acknowledged the debt, and promised to pay it some time in 1871, within less than three years prior to the institution of this suit, which was on the *third of May, 1873*. Even accepting the truth of the statements on this subject, they can not be considered, as the only evidence is parol acknowledgments and promises made by the defendant, "after prescription had already run," to the reception of which the defendant excepted, and which was not receivable under the statute. R. C. C. 2278, paragraph four, which is but a reprint of the old law. This evidence was improperly received in the court below, and can not, therefore, be considered on appeal.

Under the pleadings and the evidence, the defendant's plea of prescription should have been sustained. The case was tried by a jury, and there was a verdict and judgment for the plaintiff, for one thousand dollars. Precisely how this sum was arrived at by the jury, the record does not inform us, and there are some circumstances in the case which may have affected the jury unfavorably toward the defendant, and tended to induce the verdict which, under the law and facts, we feel it our duty to set aside. Had the evidence been confined to that introduced by the plaintiff, or to the real issues in this case, we should be content to stop here. The defendant has, however, in his zeal to defeat the plaintiff's present action, disclosed some facts which tend to show that, whether equitably liable to plaintiff or not, he may be, to some extent, legally so

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in another action or other amount. We refer more particularly to the price of bank stock which he himself owns to have belonged to the plaintiff, and the proceeds of which, when sold, appear to have inured to his benefit. Neither this nor any balance of rents collected, if such there be, can be allowed in this action; but, that no possible prejudice may result, the right of plaintiff, if any such she have, to recover in another action on these accounts, is reserved to her from this adjudication.

This record has an unsavory odor of family discord, resulting, to all appearance, from a disreputable attempt to control the small means of an ancient maiden. It is probable, from the evidence, that so far at least as the defendant is concerned, the late war and its unhappy consequences of loss and decline of property and business, and an honest impression that he had essential rights, may have been mainly responsible. Plaintiff and defendant are brother and sister, and appear to have lived most amicably and happily together, as becomes that relation, for very many years, and with the utmost mutual trust and confidence. During all those years the plaintiff was the recipient from the defendant of many substantial evidences of brotherly regard and liberality, and, whatever may be her present legal rights as against the defendant, the evidence renders it probable that they are mainly due to that kindness and confidence, and that, but for the avariciousness and interference of others, who have contributed nothing toward, but who seek to control them, those rights would never have been strictly asserted or inquired into; but that the old and proper relation between the parties would have continued undisturbed, to the mutual benefit and happiness of both. While we can not reach or remedy this through the law, we can not permit it to pass unnoticed or unrebuked. We trust we shall not be called upon to witness its repetition.

It is therefore ordered, adjudged and decreed that the defendant's plea of prescription to plaintiff's action be sustained, and that the verdict of the jury and judgment of the court below be set aside and avoided, and plaintiff's suit be dismissed with costs of both courts. It is further ordered and adjudged that her right of action for any amount which may be due her from defendant on account of bank stock sold by him, and rents of property received and unaccounted for, if any such there be, be and it is hereby reserved to the plaintiff.

Mrs. B. S. Hearing and Greig vs. Mound City Life Insurance Company.

No. 6755.

MRS. B. S. HEARING AND F. GREIG VS. MOUND CITY LIFE INSURANCE COMPANY.

No error or defect in the petition, order or citation in an appeal will cause the appeal to be dismissed, unless it be shown that such error or defect is to be imputed to the appellant.

Where a party sues in an individual capacity, and afterward, during the progress of the suit, subrogates a succession of which she is executrix to her rights, without notice of the subrogation to the defendant, the latter will not have the appeal he may take in the case dismissed, because he has only cited the plaintiff in her individual capacity. In such case the appellant will be allowed time to cite plaintiff in her administrative capacity.

Where one of the appellees has died, the appeal, as to his succession, can not be dismissed until after his representatives have been made parties to the appeal.

APPEAL from the Fifth District Court of the parish of Orleans.
Rogers, J.

Hudson & Fearn, for plaintiff and appellee.

Merrick, Race & Foster, for defendant.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

MARR, J. In October, 1871, John A. Bonnafon effected in the defendant company insurance on his life, for the benefit of A. Constant Hearing and François Greig, in unequal portions.

In November, 1871, about two weeks before the death of Bonnafon, Hearing, with the consent of insurers, assigned his interest in this policy to his wife, Mrs. Barbet Schuster Hearing; and in May, 1872, Mrs. Hearing, authorized by her husband, and Greig, brought this suit to recover their respective shares under the policy.

In December, 1872, Constant Hearing died; and his widow qualified as executrix under his will. It appears from the proceedings in this court, in the succession of Hearing, reported in 26 An. 326, that the creditors attempted to compel the executrix to have put upon the inventory, as property of Hearing's succession, his interest in this policy, and certain other policies effected by him on his own life, some in favor of his wife, some in favor of his wife and child; and that, in April, 1874, this court decided that none of these policies belonged to the succession, and affirmed the judgment of the court of first instance refusing to have them put upon the inventory.

In December, 1874, on motion of counsel for Mrs. Hearing, and on suggesting the death of her husband, and that she had transferred all her interest in the policy sued on to his succession; that this interest had been duly inventoried as the property of the said succession; and that she had been confirmed as sole executrix, it was ordered by the court that

Mrs. B. S. Hearing and Greig vs. Mound City Life Insurance Company.

the succession of A. Constant Hearing be subrogated to all her rights under the policy; "and that Mrs. Barbet S. Hearing, testamentary executrix, be made a party to this suit."

No notice of this was served on defendant; and the case proceeded without any change in the title. The appeal comes up to this court under the same title, "Mrs. Barbet Schuster Hearing and François Greig vs. Mound City Life Insurance Company," etc.

The trial commenced in December, 1874, and it was protracted so that it was finally submitted on the tenth of November, 1876. Judgment was rendered on the eleventh of December, 1876, and signed on the second of July, 1877, in favor of "plaintiffs, the succession of A. Constant Hearing and François Greig;" and after the expiration of the term defendant took a devolutive appeal, by petition, in which the conclusion of the prayer is "that Mrs. Barbet Schuster Hearing and François Greig be duly cited to appear and answer the appeal."

Citations were issued, one addressed to François Greig; one addressed to Mrs. Barbet S. Hearing, which was served on her attorneys; and another addressed to Mrs. Barbet Schuster Hearing, which was served on her in person a few days before the return day.

On the return day, appellant suggested the death of Greig before the service of citation could be made; and asked for a continuance and delay in order to have the proper representative of his succession cited, when one shall be appointed.

On the third day of the term counsel for "the succession of Constant Hearing, one of the appellees, represented by Mrs. Barbet S. Hearing, its testamentary executrix," moved the court to dismiss the appeal on the grounds:

First—That appellant did not, in the petition of appeal, pray to have said succession made a party, or to have the same cited.

Second—That the said succession has not been cited to answer the appeal.

Third—That appellant, in the petition of appeal, prayed to have Mrs. Hearing cited in her individual capacity, but not in her representative capacity; and that she was cited individually, but not in her representative capacity.

Appellant thereupon moved the court to grant him time to have Mrs. Hearing cited in her capacity as testamentary executrix of A. Constant Hearing, on such terms as the court may deem meet.

In *Guerin vs. Bagneries*, [9 La. 472], the plaintiff appealed from the judgment in favor of defendant. He did not make the parties called in warranty by the defendant parties to the appeal, and they were not cited. Appellee moved to dismiss on that ground. The opinion of the court was delivered by Judge Martin. He maintained that the parties called in war-

Mrs. B. S. Hearing and Greig vs. Mound City Life Insurance Company.

ranty were necessary parties; and that the appellant was bound to bring in all persons contradictorily with whom the judgment appealed from was rendered; but he added: "There appears to be no necessity to dismiss the appeal. The case is a new one, and justice may be attained otherwise than by driving the parties out of court."

In the argument of the case, Judge Preston, counsel for appellant, not only did not ask to be allowed time to cite the warrantors; but he argued that the appellant had nothing to do with them; that they were called in by the defendant for his protection; and that it was his business to have them cited to answer the appeal. Nevertheless, the court refused to dismiss the appeal, and allowed appellant time to have the warrantors cited.

This decision was in strict accordance with the spirit of the old English statute of *jeofail*, 14 Edward, 111. It was rendered in 1886; and in 1839 the Legislature gave it the sanction of positive law, by enacting that, "hereafter, no appeal shall be dismissed on account of any defect, error, or irregularity in the petition or order of appeal, etc., whenever it shall not appear that such defect, etc., is imputed to the appellant. Acts of 1839, p. 170, section nineteen. Re-enacted, Revised Statutes of 1870, sections 36, 1907; and since embodied in the Revised Code of Practice, article 898.

The counsel for appellant has filed in this court his affidavit showing that when he went to the clerk's office of the district court to prepare the petition and bond of appeal, he called for the papers in the suit; that the clerk informed him they were not in the office, having been delivered to a person who had taken them home with him to be copied for the appeal which it was known would be taken; and that he was compelled to draw his petition from his knowledge and recollection of the names of the parties as set out in their petition, copy of which he had.

We think that we have the right to receive the uncontradicted affidavit of counsel in such a case as this; but we find, without referring to it, nothing in the record from which it appears that the defect, or error, or irregularity complained of, in the petition of appeal is imputable as a fault to appellant.

The suit was brought in the names of Mrs. Hearing and Greig. The subrogation, which was entered on motion of her counsel, was some two years and a half before the rendering of the judgment, and three years and a half before it was signed. It did not require that Mrs. Hearing should be dismissed as a party, but that she should be made a party in her representative capacity. She was the person to be cited; she was cited; and we do not see that the failure to add to her name, in the petition or citation of appeal, her quality and capacity as testamentary

Mrs. B. S. Hearing and Greig vs. Monnd City Life Insurance Company.

executrix, is such a defect, or such error or irregularity as would justify the dismissal of the appeal.

The representatives of Greig have not been cited; and the appeal can not be dismissed as to his succession until it is properly represented. The application of appellant to cure the defect complained of, by having Mrs. Hearing cited in her representative capacity, causes no delay, no prejudice to the appellee; and, under the circumstances of the case, as disclosed in the record and proceedings in the court below, we could not dismiss this appeal without violating the letter and spirit of article 898, R. C. P., our statute of *jeofail*. We think the ends of justice can be better attained otherwise.

It is therefore ordered, adjudged, and decreed that the motion to dismiss the appeal be overruled; and that time be allowed appellant until the second Monday of January, 1878, to have Mrs. Barbet Schuster Hearing, in her quality and capacity as testamentary executrix, representing the succession of Antoine Constant Hearing, cited to appear and answer this appeal.

No. 6712.

CITY OF NEW ORLEANS vs. J. B. PIGNIOLO AND M. POPOVICH.

The only evidence required to authorize a court to grant an order of seizure and sale, on certain promissory notes of the defendants, secured by a mortgage importing a confession of judgment, is a properly certified copy of the act of mortgage passed before a notary public and two legal witnesses, with the notes themselves paraphrased by the notary, and identified with the act.

Where a debtor makes a part payment of a debt evidenced by his two mortgage notes, one of which is due, and the other not due, and the partial payment is receipted by the creditor across the face of the matured note, the payment will be imputed to that note. In such case an order of seizure and sale need not make any imputation of payment; nor need such an order fix the exact balance due a creditor to whom partial payments have been made.

On appeal from an order of seizure and sale this court will not consider the rights and obligations of the parties, growing out of another suit. On such an appeal but one question will be considered, and that is, was the evidence before the court below sufficient to authorize the order.

A PPEAL from the Sixth District Court, parish of Orleans. *Rightor,*
J.

B. F. Jonas, City Attorney, for plaintiff and appellee.

E. Bermudez, for defendant.

The opinion of the court was delivered by

MARR, J. This is an appeal from an order of seizure and sale.

Counsel for appellants, the mortgagors, has filed a brief, in which he admits, what is well settled in our jurisprudence, that the question on appeal in such cases is: Has the plaintiff submitted sufficient authentic

evidence in support of his demand? He insists, however, that this court must determine whether the lower court rendered such a decree as should have been rendered. He also urges that the prayer of the petition is vague, and does not state the capital claimed by plaintiff; and that there was an imputation of payment to be made, which should have been done by the judge in the judgment.

Counsel also call our attention to the fact that the city is a party to a suit now pending in this court, on application for rehearing, in which the title to the mortgaged property is involved; and he asks that we will, in that case, grant the defendants, the appellants in this case, the relief which they claim.

The petition for executory process in this case sets forth that the city is the holder and owner of two notes, drawn by appellants to their own order, and by them indorsed, both dated twenty-ninth June, 1872, each for \$4176, one at three years, and one at four years, bearing interest at eight per cent *per annum* from date until final payment, secured by mortgage on certain land, described; and that the note at three years is entitled to a credit of \$3200, paid on account of it on the twenty-eighth of July, 1875. The prayer is that a writ of seizure and sale issue, commanding the sheriff to seize and sell the property described, to pay and satisfy the claim on said notes in principal and interest, subject to the aforesaid credit, with five per cent attorney's fees, five dollars costs of copy of the act of mortgage, and costs of suit.

A certified copy of the act of sale, in which the mortgage is reserved and stipulated, passed before a notary and two witnesses, and the two notes, paraphed by the notary, and fully identified with the act, were filed with the petition. This evidence was all authentic: the act imports confession of judgment; the credit of \$3200 is written across the face of the note at three years, in the form of a receipt acknowledging the payment of that amount, on the twenty-eighth of July, 1875, on account of that note; and the prayer of the petition is clear and appropriate.

The order of the court is: "Let a writ of seizure and sale issue in this case as prayed for according to law:" and this is the judgment appealed from.

There is no question of the imputation of payment. The note at four years did not mature until more than eleven months after the payment was made; and the imputation was expressly made to the note at three years, which had become due about a month before the payment was made.

It was a matter of mere calculation of the simplest kind, to ascertain the amount due in principal and interest, on the note at three years, up to the twenty-eighth of July, 1875, to deduct the credit of \$3200, and thus to fix the balance bearing interest from that date. It was not the busi-

ness of the judge to make this calculation. In ordinary suits on promissory notes it is not unusual for judgment to be rendered for the face of the note sued on, subject to such credits as may have been admitted or proven on the trial; and no law requires the judge to deduct the credits, and to fix the balance.

We fail to discover any error or even irregularity in the proceedings in this case; and we can not inquire in this appeal, certainly we can not go out of the record to ascertain, what may be the relations, or rights and obligations of the parties dependent upon the final decision in another suit. The simple question is, whether the order of seizure and sale was granted on proper and sufficient evidence; and no fact or circumstance not appearing in the record can be considered in determining that question.

The appellee prays for the affirmance of the judgment, with damages. The appellants may have supposed that they had cause to complain, and to seek relief by appeal, although we find none in the record; and we shall not inflict damages upon them.

The judgment appealed from is affirmed, with costs.

No. 5413.

29 837
112 172

LEONVILLE AUGUSTIN VS. MR. AND MRS. M. P. AVILA.

The moment a succession under administration is closed, the probate court ceases to have jurisdiction of any *ordinary* suit then pending before it, in which the succession is a defendant. And any judgment afterward rendered in such suit by the probate court, is null and void.

A PPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J.*

Paul E. Théard, for plaintiff and appellee.

Ed. J. Bermudez, for defendant.

The opinion of the court was delivered by

DEBLANC, J. On the 5th of January, 1871, this, an ordinary suit on a contract, was filed in the Fourth District Court of this city, for the recovery of \$1476, alleged to be due by defendants to plaintiff.

Nearly one year after this suit was brought, Mr. Avila, one of the defendants, departed this life, leaving a minor child. His succession was opened on the 17th of January, 1872.

The interest of said minor in whatever she inherited from her father, was adjudicated to her mother and tutrix, for its appraised value, and, on the 22d of March, 1872, the adjudicatee, Mrs. Avila, was put in posses-

Augustin vs. Mr. and Mrs. Avila.

sion of all that composed the succession of her deceased husband and the community which had existed between them.

From that date, said succession was closed.

Avila died on the 2d of January, 1872. After his death, this case, by consent of parties, was transferred from the Fourth to the Second District Court. It was filed in the last mentioned court on the 30th of January, 1873. There, on the 4th of May, 1874, more than two years after the succession had been closed, a judgment was rendered against said succession, not only in favor of plaintiff, but also in favor of parties who had intervened in the original suit.

This case was, at its inception, and, at the death of Avila it did not cease to be an ordinary suit, one in which, for a moment only, a succession was one of the defendants; but as at no time, that case either had or assumed a probate character, it could not have been legally transferred, even by and with the parties' consent, to a court whose jurisdiction is exclusively probate. C. P., 92; 25 A. 56, 220, 225; 28 A.

This suit still belongs to the jurisdiction from which it was transferred, and, with the incidental demands therein filed, must be returned to that jurisdiction. 22 A. 81.

It is therefore ordered that the judgment of the lower court be and it is reversed at appellee's costs, and that this case be re-transferred from and by the Second to the Fourth District Court of the city of New Orleans, there to be proceeded with according to law.

No. 6721.

STATE EX REL. ELLA SMITH ET AL. VS. JUDGE OF THE SECOND DISTRICT COURT, PARISH OF ORLEANS.

A judgment debtor, who having applied for a suspensive and a devolutive appeal in the alternative, elects to take the devolutive appeal, and gives the bond fixed by the court for that appeal, forfeits his right to a suspensive appeal, and therefore is not entitled to a writ of prohibition to arrest the execution of the judgment.

To suspensively appeal from a judgment which orders the delivery of movables and immovables, the amount of the appeal bond should exceed by one half the estimated value of the movables, and of the revenues to be derived from the real estate pending the suit.

APPEAL from the Second District Court, parish of Orleans. *Tissot, J.*

Kennard, Howe & Prentiss and *A. & W. Voorhies*, for relator and appellant.

E. H. Farrar, for respondent.

The opinion of the court was delivered by

DEBLANC, J. The parties, in this case, are George W. Bancker, who-

State ex rel. Ella Smith vs. Judge of the Second District Court.

appears in his own name and as executor of the last will of Henry Fassman, and Mrs. Bancker and Mrs. Smith, children of said deceased. In their petition for a prohibition we find Bancker's admission "that, within ten days from the signing of the judgment by which he complains that he has been aggrieved, he, individually and as executor, moved for a suspensive and devolutive appeal, in the alternative, and, being unable to furnish bond in the amounts required by the court for a suspensive appeal, he actually filed, within the aforesaid delay, his two bonds, in the amount fixed for the devolutive appeal.

Whatever were or may have been, under his application for an appeal, his rights, the nature and extent of those rights, he has, by his submission to, and compliance with that part of the order of court granting a devolutive appeal, not only exercised, but exhausted his rights, and in as much as he can not be allowed two appeals from the same judgment, he can not be relieved from the effects of his own act, his own choice. It matters not that he has furnished bond during the delay within which he could have taken and did take a suspensive appeal. The bond then given by him is that which was fixed for the devolutive appeal, and no proceeding of his has or could have suspended the execution of the judgment. 12 R. R. p. 322.

If he considered as unlawful the condition imposed, the amount of the bond required by the lower court, to authorize a suspensive appeal, he should have applied for the redress he now seeks to obtain, before perfecting the other, the devolutive appeal. We can neither change the name, nor extend the effects of his appeal.

Had he, within the prescribed delay, applied for and been allowed "*an appeal*," without coupling with that term the qualification "devolutive," he might successfully invoke the presumption that the object of an appeal is, generally, to suspend a judgment until its revision by the appellate tribunal; but, this he did not do; he was allowed, in the alternative, a suspensive and a devolutive appeal. He availed himself of the latter, and, impliedly at least, renounced to the former.

Can we, distorting the plain signification of the qualification which fixes the character of his appeal, decide that he intended to do otherwise than he has done, that he intended to take, and, because he so intended, he should be allowed another, a different appeal, one for which he gave no bond, neither that required by the court, nor any other, one which he abandoned and why? He was unable to furnish the required obligation. He so stated himself.

As to Mrs. Smith and Mrs. Bancker, what are the facts? As testamentary executor of Henry Fassman, George W. Bancker was ordered by the Second District Court to file an additional, a third account of his administration. He obeyed that order, filed an account, the homologa-

tion of which was opposed by Victor E. and Frank Fassman, as heirs and creditors of the aforesaid deceased. To these proceedings neither Mrs. Smith, nor Mrs. Bancker were made parties, either by an actual or constructive citation. Judgment was rendered partly in favor of Bancker and partly in favor of the opponents.

Within ten days of the signing of said judgment, Mrs. Bancker and Mrs. Smith applied for and obtained an unqualified appeal, and, within ten days, they furnished bond in the amount fixed by the lower court, fifteen hundred dollars. They now contend and defendants deny that said appeal suspends the execution of the judgment.

There can be no doubt that the judgment appealed from does not answer the description of that referred to in the 575th article of the Code of Practice. It is not, as against Bancker or any one of the appellants, a judgment for any specific sum. It orders the classification, not the payment of two judgments previously obtained before another court, by the two opponents, and which, then, had already acquired the force and effect of *res judicata*, and that order did not authorize the court to require the bond mentioned in said article.

This, however, is not the only difficulty which we are called upon to solve. Though the judgment appealed from embraces twenty distinct decisions on not less than twenty oppositions, it is but one judgment, and relators have appealed, not as they might perhaps have been allowed to do, from any specified or separate decision included in that general decree, but from the judgment, and, of course, from every part, every branch of the same. Considering the pleadings and the decree, is their appeal a suspensive or a devolutive appeal?

Two of the decisions comprised in the general judgment, command:

The first, that, in his next account as executor of Fassman's will, Bancker shall substitute, in lieu of \$25,000, the alleged price of a sale avoided by said judgment, the property described in the act of sale, a cotton press and the ground on which it is built, and, besides, the revenues of said property since the thirteenth of July 1872.

The other, an inventory of the movables claimed as belonging to the succession of Fassman, and which, it is alleged, Bancker has converted to his own use.

The sale of the cotton press was declared a mere simulation, intended to cover the unlawful title which, apparently, passed from Bancker, as an executor, to Bancker, as an individual, and according to the pleadings and the judgment appealed from, the whole of said property, the most of which is of a perishable nature, is in Bancker's possession. To have suspensively appealed from the decree which orders the delivery of that property to the succession, what bond should have been given? One exceeding by one half the estimated value of the movables, and of

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the revenues to be derived from the real estate, during the suit. C. P. 577.

We learn from the judge's answer to this rule, that the personal property, the inventory of which he ordered, was variously estimated at from two to fifteen thousand dollars, and the revenues of the cotton press, those already realized, and those that may accrue during this litigation, at \$30,000. To protect the succession of Fassman, his heirs and creditors against the possible loss, the inevitable deterioration of the property which the suspensive appeal would leave in possession of one who, according to the decree, is not entitled to that possession, to protect the interested parties against the injury which may be caused by that appeal, a bond of fifteen hundred dollars is not sufficient. 22 An. 589. 27 An. 334.

The rule *nisi* granted on the thirteenth of October 1877, is, therefore, discharged at the costs of relators.

No. 5432.

J. DAVIDSON HILL & Co. vs. MRS. ADELAIDE BOURCIER AND B. M. POND.

29	841
106	388

The appellate jurisdiction of this court is not divested by the fact that, pending an appeal in any particular case, the appellant has become a bankrupt. In passing on the question of their appellate jurisdiction, this court will consider no fact which does not appear in the transcript of appeal.

29	841
123	327

Pending a suit against a principal, and his surety, the surety can not ask that proceedings against him shall be arrested until the property of the principal has been discussed. In such case he can only ask, after having complied with certain requirements exacted by law, that the property of the principal shall be discussed under execution, before recourse on his property is had.

The granting of a new lease, after a former lease has expired, will not work a novation, when nothing appears in evidence showing that the parties intended to novate.

The money received by a lessor for rent due on account of a new lease, will not be imputed to the payment of any balance due by the lessee on a former lease, of the same property, unless so stipulated by the lessee.

The mere neglect of a privilege creditor to sue will not release the surety of the debtor, even to the extent of the value of the privilege held by the creditor, unless it be proved that in consequence of such neglect, the privilege was lost.

Where a judgment creditor is clothed by law with a certain privilege, or pledge, the mere absence of any express recognition of the privilege, or pledge, in the judgment of the court, does not impair the lien.

A PPEAL from the Sixth District Court, parish of Orleans. *Saucier, J.*

Ogden & Hill, for plaintiffs and appellees.

Clarke, Bayne & Renshaw, for defendant.

The opinion of the court was delivered by

MARR, J. Appellees leased a dwelling to Mrs. Bourcier for one year,

ending the thirtieth of September, 1873; and B. M. Pond became her surety for the performance of the stipulations of the contract.

At the expiration of this term a new lease was granted to Mrs. Bourcier, at a reduced rent, without security, for the year ending the thirtieth of September, 1874; and she continued in the occupation of the premises.

The rent for the last six months under the first lease was not paid; and, in January, 1874, suit was brought against Mrs. Bourcier and Pond to recover the amount. She allowed judgment by default to be taken and confirmed against her. Pond answered that he was no longer liable as surety, because the lessors had novated the contract with Mrs. Bourcier, and had accepted her as their tenant for a prolonged period; and had received from her rent sufficient to discharge the debt for which he was surety; and had released securities and privileges held by them under the contract of lease sued on; and that they were bound to discuss the effects of Mrs. Bourcier before proceeding against him.

From the judgment of the district court against him Pond took this appeal; and it was returnable and was returned in this court on the first Monday of November, 1874.

When the cause came up for hearing counsel for appellant stated that his client had commenced proceedings in bankruptcy in March, 1876; and he filed a paper in which that fact is set forth, with a certificate of the Clerk of the United States District Court that the proceedings in bankruptcy were still pending in that court on the ninth of November, 1877. It was suggested in this paper that this court no longer has jurisdiction, and that the cause must be remitted to the United States District Court.

In *Serra é Hijo vs. Hoffman & Co.*, 29 An. 17, we decided that the jurisdiction of this court was not divested by the bankruptcy of the appellant pending the appeal; and we are satisfied of the correctness of that decision. Having appellate jurisdiction only, this court is required, by the appeal, to determine whether, upon the case made in the court of first instance, as shown by the transcript of the record and proceedings, the judgment appealed from is correct. To determine this question we must look to the transcript alone, for the obvious reason, in addition to the positive terms of the law, C. P. 894, etc., that nothing which may have occurred since the judgment was rendered can make it either correct or erroneous. The satisfaction or discharge of a judgment pending the appeal, must be set up in a court of original jurisdiction, against the enforcement of that judgment, after the appeal has been determined; and not in the appellate tribunal.

In order to guard against misapprehension, we take occasion now to add that, when a judgment is affirmed on appeal, the decree of affirm-

ance gives it no new force or effect. If a discharge in bankruptcy could have been set up against the enforcement of the judgment, in the event that no appeal had been taken, the affirmance of that judgment by this court could not prevent or interfere with that legal consequence and effect; and in no event could the action of this court, on the appeal, deprive the appellant of any right, or remedy, or relief, under the bankrupt law, against that judgment, to which he may have become entitled after it was rendered.

The surety has the right, under certain circumstances, to demand the discussion of the property of the principal debtor. Where suit is brought against the surety alone, he may interpose the plea, and compel the creditor to discuss the principal debtor. The effect of this is to stay proceedings against the surety until judgment has been obtained against the principal debtor, and execution against his property has proved insufficient. When the suit is brought against the surety and the principal debtor the plea of discussion does not require or authorize any suspension of the proceedings; but the judgment will be so modified as to require the creditor to proceed by execution against the property of the principal, and to exhaust it before resorting to the property of the surety. *Bernard vs. Custis*, 4 Martin, 215; *Banks vs. Brander*, 13 La. 276.

In either case, the surety who desires to avail himself of this right must demand it *in limine*, "on the institution of proceedings against him." He must, moreover, point out to the creditor property of the principal debtor, not incumbered, subject to seizure; and must furnish a sufficient sum to have the discussion carried into effect. R. C. C. 3045, 3046, 3047. A plea which does not meet these requirements must be disregarded. *Robekot vs. Folse*, 11 La. 136; *Banks vs. Brander*, 13 La. 276.

"Novation is a contract, consisting of two stipulations: one to extinguish an existing obligation; the other to substitute a new one in its place." R. C. C. 2185. We find in the record no evidence of any such contract. The granting of a new lease, at the expiration of the first term, did not extinguish, nor did it in any manner impair, the rights and obligations of the parties under the first lease: nor does it tend to show the substitution of a new contract or obligation in place of the first contract. These propositions do not admit of discussion; nor do they require the citation of authorities.

We have searched the record in vain for evidence tending to show that any payment was made on account of the rent sued for. Mr. Hill, the only witness who says any thing on this subject, testified on the ninth of March, 1874, that he had collected of Mrs. Bourcier the rent under the new lease, for four or five months, at \$125 a month; and that the whole amount sued for, \$900, was still due and owing at that time. We know

of no law which compelled him to impute the money thus collected on account of the new lease to the debt due under the first lease. Mrs. Bourcier, owing both debts, might have required any money paid by her to her creditor to be imputed to the one or the other at her option; but the fact, as proven by Hill, that the collections were on account of the new lease, shows that she required the imputation to be made to the new debt, or that it was made to that debt by the creditor with her consent and approbation.

Hill testified that Mrs. Bourcier was still in the occupation of the leased premises; and that he had no knowledge of any change in her furniture.

Counsel for appellant argues that the failure of the lessors to enforce their privilege on the furniture, and to pray for judgment with privilege in this case, prejudiced his right of subrogation, and discharged him. He relies upon article 3061, R. C. C., which is as follows:

"The surety is discharged when by the act of the creditor the subrogation to his rights, mortgages, and privileges can no longer be operated in favor of the surety."

Jurisprudence has settled the law that the surety is not discharged by the mere omission of the creditor to sue the principal, or to enforce his privilege. If by the act of the creditor, or his willful neglect or want of proper diligence, any of the securities, rights, mortgages, and privileges by which the debt was secured, are lost, so that they can no longer be made available, the surety is discharged to the extent of their value. See *Parker vs. Alexander*, 2 An. 188; *Saulet vs. Trepagnier*, 2 An. 427; *Bank vs. Escoffie*, 2 An. 830; *Bank vs. Ledoux*, 3 An. 674; *Shields vs. Barrow*, 13 An. 57; *Succession of Pratt*, 16 An. 357; *Elmore vs. Robinson*, 18 An. 651; *De Nouvion vs. Hodgson*, 23 An. 438.

The Code has not left the surety at the mercy of the creditor; on the contrary, it affords him ample means of protecting himself. In the present case, at the time the suit was brought, Mrs. Bourcier occupied the leased premises; and it is to be presumed, the contrary not appearing, that she continued to occupy up to the expiration of the term under which she held, the thirtieth of September, 1874. All the furniture in the house was subject to the lessor's right of pledge. There is no proof of the value of this furniture; but it is not shown that any of it had been removed. The suit was against principal and surety; and when Pond was cited he might have paid the debt immediately, and thus have become *dominus litis*. He would have been subrogated, by mere operation of law, to all the rights, actions, and privileges of the lessors against the lessee; R. C. C., article 3052; and he might have exercised and enforced them for his own account and benefit. In *Robinson vs. Staples*, 5 An. 712, it was expressly decided that the lessor need not seize provis-

ionally in order to preserve his privilege. Nevertheless, if Pond had paid the debt, before judgment, he might have amended the pleadings, and have seized the furniture provisionally, if he had deemed this necessary for the enforcement of the privilege. The fact that it was not necessary is demonstrated in this case, because the furniture was not removed, nor is there any proof of any thing having been done with respect to it which placed it beyond the reach of the lessors' privilege.

It is urged that as the lessors obtained a judgment for the rent due, without any recognition of their privilege, they had lost that privilege; that they could no longer have enforced it themselves; and that Pond could not have acquired, by subrogation, the rights and privileges which had thus been lost.

This view seems to be founded on a misapprehension of the law. There is a plain distinction between those cases in which the seizure of the property alone gives the privilege, as in attachment, and those in which the debt itself creates the privilege. In the first class of cases it has been held that the attaching creditor has no privilege if he does not pray for it, and have it awarded to him on the final judgment. Succession of Caldwell, 8 An. 42. And yet, in Love vs. Voorhies, 13 An. 549, it was decided that where the property attached was released on bond, and judgment was obtained against the debtor in which no reference or allusion was made to the attachment, the omission of the usual phrase "with privilege on the property attached," did not discharge the surety on the release bond.

In the other class of cases, where the privilege does not result from the seizure, but is created by, and is a legal accessory of, the debt, it exists independently of the judgment. In Parker vs. Starkweather, 7 N. S. 340, plaintiff seized, under *feri facias*, a quantity of blacksmith's tools, which defendant sought to have released, under article 644 of the Code of Practice. The tools would have been exempt from seizure under execution on a judgment for an ordinary debt; but they were liable to the lessor's right of pledge and privilege; and the suit in which the judgment was rendered was for rent. The court, reversing the judgment of the lower court, which released the seizure, said:

"It is necessary to remark that, in this instance, the seizure was made under a *feri facias*; but the suit in which the judgment was rendered was for rent; and we are of opinion that the privilege of the lessor was not lost by the form of execution in which he sought to enforce it."

In Holmes vs. Holmes, 9 Rob. 118, the wife, entitled to a tacit mortgage, omitted to pray for its recognition; and she sought, by appeal, to have the judgment so amended as to allow her mortgage rights, and to permit her to enforce them. The court said:

"If the appellant is entitled to a mortgage on her husband's property,

to secure the amount sued for, it arises from the law itself, and there is, perhaps, no necessity for mentioning it in the judgment, as a mere omission to recognize it could not deprive plaintiff of its effect, if she is really entitled to enforce it. It will be time enough to inquire into plaintiff's alleged right of legal mortgage, if ever it comes in conflict with the rights of her husband's creditors."

In *Gustine vs. Union Bank*, 10 Rob. 418, the same learned court, through a different organ, laid down the same doctrine in these terms:

"If, under the law, the debt creates a privilege or tacit mortgage, such privilege or tacit mortgage exists independent of the judgment rendered upon it."

To bring the present case within these decisions, it is only necessary to add, that the suit was brought upon the lease and the rent notes; so that it was a suit for rent; and the debt was one which created, and to which was attached as a legal accessory, not merely a privilege, but a right of pledge on the movables of the lessee, and those belonging to third persons found on the leased premises. R. C. C. article 2705, *et seq.* 3218.

It is elementary that a judgment is conclusive, and constitutes *rem adjudicatam* only with respect to what was the object of the demand. R. C. C. 2286. The mortgage creditor, when he proceeds *via executiva*, neither asks for nor obtains any judgment *in personam* against the debtor. He merely asks that the mortgaged property be seized and sold in satisfaction of the mortgage debt. Suppose he should choose to obtain a judgment *in personam* on the mortgage notes. Any property of the debtor not exempt by law, might be seized under *feri facias* on that judgment; and if the mortgaged property should be seized and sold under that writ, the proceeds would be applied to it, unless some one should intervene and claim a superior right. The mortgage creditor would exhibit his mortgage, and if it outranked the claim of the opposing creditor, the opposition would be defeated. To enforce a mortgage or a privilege the property must be sold; and, as the court said in *Parker vs. Starkweather*, 7 N. S., the form of the writ can not prejudice the privilege.

The landlord having a privilege and right of pledge, as in *Parker vs. Starkweather*, chooses to obtain a judgment *in personam* against his debtor for the rent due, and to enforce it by *feri facias*. The proceeds of sale will be paid to him, of course, unless a superior right is asserted. In answer to such a claim the lessor would show that the suit in which the judgment was rendered was for rent, and that the property sold was that which was affected with his privilege and right of pledge; and no claim inferior to this could be set up successfully against him.

As the court well said in *Holmes's case*, 9 Rob. 119, it will be time enough to inquire into the right of the creditor to the proceeds of the sale under execution, when it conflicts with the rights of others. Until such

a conflict does arise in a contest for the proceeds, the privileged creditor, whose debt creates the privilege, has no occasion to assert or to maintain his privilege, because, no matter what may be the form of the judgment or the writ, the privilege exists independently of either.

The Code of Practice, article 156, provides that "if one demand less than is due him, and do not amend his petition in order to augment his demand, he shall lose the overplus;" and article 157 declares that if the creditor fail to claim the interest due him, he can not afterward demand it in another action.

These articles relate to the amount of the demand; and they can have no application to cases in which the creditor, entitled by law to a privilege, proceeds in *personam* for the debt, and seizes, under *feri facias*, the precise property affected with his privilege. In this case, we have seen that Pond, if he had paid the debt before judgment, would have become *dominus litis*, and might have amended the pleadings, and caused the furniture subject to the lessors' privilege to be seized provisionally, and sold in satisfaction of the debt. If he had paid after the judgment against Mrs. Bourcier, he might have had execution issued on that judgment and have seized and sold any property belonging to Mrs. Bourcier, not exempt by law, including the furniture in the leased premises; and no one, not having a right superior to that of the lessor could have competed with him for the proceeds. The furniture, being still in the leased premises, was subject to the rights of the lessors, just as it was at the beginning and as it was at the end of the term for the rent of which Pond was surety. It was also affected with the lessors' privilege for the rent under the new lease; but if the lessors had received the rent due under the first term from the surety, he would have been subrogated to their rights under the first lease, which was superior to that under the new lease. It would have been bad faith on their part, and the law would not have permitted them to assert even equality of right, much less superiority, to the prejudice of their subrogee, the surety; and they would have been compelled to yield to him in rank and preference.

It is not shown that Mrs. Bourcier owed any other debt; and *non constat* that there would have been any conflict or contest for the proceeds of the sale of the furniture found in the leased premises; but if such conflict had arisen, nothing had occurred to impair the privilege and right of pledge by which the debt was secured.

There is no evidence in the record of any act on the part of the lessors by which the surety's right of subrogation was either lost or impaired; nor of any fact which discharged his liability under the contract. We do not know, because the record does not inform us, and we can not go outside of it to inquire, what may have occurred since the appeal was

taken tending to the discharge of the surety. The transcript discloses no error in the judgment appealed from; and that is all that we intend to decide, and it is precisely what we do decide.

The judgment appealed from is, therefore, affirmed with costs.

DEBLANC, J. I concur in the decree which precedes.

No. 6416.

STATE EX REL. LOUIS FIX vs. F. J. HERRON, RECORDER OF MORTGAGES, ET AL.

The deed of a State tax collector is not conclusive of the legality of the title conveyed by it. If such a title is properly put at issue, its validity must be proved by the party claiming under it.

A mandamus will not issue, at the instance of a purchaser of real estate at a tax sale, to compel a recorder of mortgages to erase the privileges and mortgages recorded against the property (when the holders of the liens oppose their erasure), until such erasure shall have been decreed in a regular suit, conducted contradictorily with all the parties holding the recorded liens.

A mandamus can only be appropriately invoked, to enforce an ascertained right, or compel the performance of a recognized duty, in cases where the ordinary legal processes do not afford an adequate remedy.

A PPEAL from the Superior District Court, parish of Orleans. *Lynch, J.*

Charles Louque, for relator and appellant.

Hornor & Benedict, for Recorder of Mortgages.

S. P. Blanc, Assistant City Attorney, for city of New Orleans.

James Graham, curator *ad hoc*, for absent heirs.

The opinion of the court was delivered by

DEBLANC, J. In a petition filed on the nineteenth of May, 1876, Louis Fix alleges that he purchased, for State taxes, three lots of ground situated in the city of New Orleans, and which, heretofore, belonged to and had been assessed, two in the name of Henry Decker, and one in the name of Widow William Piles; that, after the expiration of the delay fixed by law for the redemption of property so acquired, his titles to those lots were confirmed by the Auditor, and that by virtue of said sales and their confirmation, all liens and incumbrances previously recorded against said property have been annulled and should be erased.

This proceeding is directed against F. J. Herron, who, in May, 1876, was the Recorder of Mortgages for the parish of Orleans. As to those for whose benefit those liens and encumbrances have been registered, the prayer of relator's petition is merely that they be notified of his proceedings and made parties to the same. The recorder was ordered to comply with the demand of Fix, or show cause, on the 24th of May, less than five days from the filing of that demand, why the alternate writ of mandamus allowed against him should not be made absolute.

The recorder and the other parties appeared in the lower court and excepted to plaintiff's action, on the ground that he has mistaken his remedy, and that, considering his own averment, he is not entitled to the writ which he seeks to obtain. That exception was sustained, plaintiff's rule discharged, and he has appealed.

Under the constitution of 1868, the tax collector's deed must be received as the evidence of a valid sale; this is not disputed, but that evidence is not conclusive, can be contradicted; and, when contradicted, ceases to uphold the assailed title, which, then, must fall, unless its validity be otherwise established. If so, those who have or claim, in or on the property, a recorded right, must be not merely notified of an application to compel an officer to destroy that right, or the evidence of that right, but regularly cited to appear and protect their interest.

The actual recorder, the recorder who alone could now comply with plaintiff's demand and erase the liens and incumbrances bearing on the property which he claims, is not before this court; but, were he here, the application for a mandamus would have to be refused; when the cancellation of mortgages and privileges is asked by one, opposed by another, that cancellation can properly be ordered but in an ordinary proceeding, contradictorily with those who control the inscriptions, and not, assuredly, by a writ of mandamus. 4 L. 17; 5 L. 329; 6 L. 454; 6 R. R. 299; 8 R. R. 97; 11 R. R. 161.

The application against the recorder is at least premature. Until it shall have been decided that said inscriptions have been annulled by the collector's sales, what is the recorder's duty? Is it to disregard the protest of those in whose favor they were made, and erase, cancel, and destroy them? It is the very reverse.

If hereafter and in a suit between the contending parties, it be held that the title of relator is valid, that the collector's sales have swept the mortgages and privileges affecting the property, and, notwithstanding the decree, the recorder refuses to erase those incumbrances, he shall then be compelled, by a writ of mandamus, to perform that duty.

It may be said, every one of the parties who claim to have any right in or on the property acquired from the collector is before the court, but how? They were merely notified, some as late as the 22d of May, that this application against the recorder would be tried, and when? According to the notice, on the day it was served; according to the application, on the 24th of said month. In form as in substance, plaintiff's action is irregular.

Who are the parties who have been thus notified? They are—one, the former owner of one of the lots sold, the others are heirs and creditors, minors and absentees; and, even if a mandamus were, as to plaintiff, to them, and in this case, an appropriate remedy, those parties or

those by whom they were represented, were not allowed a reasonable delay to prepare and interpose their defense.

Under no allegation of his application, no part of his evidence, is plaintiff entitled to the extraordinary remedy, which can be allowed but to compel action and coerce the performance of a pre-existing duty, to enforce an already recognized right, and not to ascertain either the existence, the satisfaction, the loss, the nature, or extent of that right; to supply the want of any other adequate remedy, and not to supersede the ordinary forms of ordinary proceedings.

"In determining upon the right to relief by mandamus, the test to be applied is to inquire whether the party aggrieved has a clear, legal right, and whether he has any other adequate remedy, since the writ only belongs to those who have legal rights to enforce, and who find themselves without an appropriate legal remedy. In this sense, it may be regarded as a "*dernier ressort*," etc. High, Extraordinary Remedies, sec. 10.

There is no error in the judgment appealed from, and that judgment is affirmed with costs.

No. 6740.

J. M. TUPERY vs. T. M. EDMONDSON.

In counting the ten days delay within which the bond for a suspensive appeal from a judgment of a lower court must be filed, neither the day on which the judgment is signed, nor Sundays, nor the day on which delay expires, is to be included.

A PPEAL from the Sixth District Court, parish of Orleans. *Rightor, J.*

Emile Legendre and Victor Olivier, Jr., for plaintiff and appellee.
Edward Phillips, for defendant.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

EGAN, J. The appellee moves to dismiss this appeal because the bond was not filed within ten days as required by law. The judgment was signed on the eighteenth of June, 1877, and the bond filed on the thirtieth of the same month. One Sunday was included in this time. We held in the case of the State ex rel. Mercier vs. the Judge of the Superior District Court, 29 An. 224, that by the express textual provision of the Code of Practice, article 575, Sundays are excluded in the count of the time within which the appeal is to be taken, and that the provision of article 318 C. P., "but in all cases where delay is given either to do some-

29	850
110	498
29	850
118	970

Tupery vs. Edmondson.

thing or to answer neither the day of serving the notice nor that on which the act is to be done or the answer filed are included" applies to taking appeals. The law and the courts do not favor the dismissing of appeals. Omitting from the count in this case the day the judgment was signed, the intervening Sunday, and the day the bond was filed, it is in time.

The motion to dismiss is overruled.

No. 6359.

CITY OF NEW ORLEANS VS. NEW ORLEANS CANAL AND BANKING COMPANY.

The return of the city tax assessor, setting forth the amount of the taxable capital of a banking corporation, will be held as true, until the contrary has been shown by the bank.

When a bank claims that a portion of its capital is invested in United States bonds, stocks, or currency, it must show affirmatively, the exact amount of its capital so invested. Otherwise, its capital thus invested will not be exempt from taxation.

The mere fact that at various periods during the year the tax is assessed, the bank "held" large amounts in United States currency, will not exempt its capital from taxation to the extent of those amounts, unless the bank proves that the currency so "held" was a part of its capital.

While the ordinary deposits of United States currency (or national bank notes), in a bank by its customers enter into, and form a part of its *assets*, they at the same time create liabilities of the bank, and thus offset themselves as *assets*. Such deposits therefore do not constitute a portion of the *capital* of a bank, and hence the bank can not claim that its capital shall be exempt from taxation to the amount of such deposits.

The capital of a bank which is subject to taxation, as capital, is made up of the balance of its *assets* remaining after deducting its debts, that portion of its *assets* exempt from taxation, and that portion which is taxed under another name than capital.

United States currency, and national bank notes belonging to a bank, although non-taxable, are a part of its *assets*, and in ascertaining the real amount of its taxable capital, such currency, and notes, must be held as compensating the debt due depositors, and thus, *pro tanto*, extinguishing the liability of the bank.

A PPEAL from the Superior District Court, parish of Orleans. *Lynch, J.*

S. P. Blanc, Assistant City Attorney, for plaintiff and appellee.

Finney & Miller, for defendant.

The opinion of the court was delivered by

SPENCER, J. The city of New Orleans sued the defendant Canal Bank, for a tax of one and one half per cent on its capital not invested in real estate. The value of such capital is assessed at the sum of \$700,000, making the amount of tax \$10,500. There was judgment final on default in favor of the city and the bank appeals. The case comes up on a statement of facts, of which the following are those material to the issue:

"5th. It is admitted that the proper printed forms to be filled up with items of taxable property were duly served by the assessor upon the president of the defendant bank, and that he returned it filled and signed and that it showed no taxable capital."

"6th. That the capital of the defendant paid up is \$1,000,000, of which \$200,000 is invested in real estate and taxed as such, and that it held from first February to first July 1875 the amounts of "greenbacks" and national currency indicated by Exhibit 'Z' hereto annexed."

The Exhibit "Z" shows the amount of greenbacks and national currency respectively held by the bank for each day from first February to first July—the dates between which the law requires the assessment to be made. The amounts fluctuate in "greenback" between \$1,535,000 and \$762,000, and in national currency from about \$400,000 to \$85,000. There was on hand June 30 \$762,000 in "greenbacks" and \$158,000 in national currency—making total \$920,000.

{ It is conceded by both parties that whatever part of the capital of the bank, was invested in United States, stocks, bonds and currency, is by the laws of the United States exempt from taxation.

The defendant on whom lay the burden has offered no proof that any part of the capital of said bank was so invested. The admission in the statement of facts is that over and above the amount \$200,000, invested in real estate, the bank had a paid up capital of \$800,000 "*and that it held from first February to first July 1875, the amounts of greenbacks and national currency indicated by Exhibit "Z."*"

It is not shown that the currency thus "*held*" *was its capital, or any part thereof*. The Exhibit shows that at several periods between first February and first July, it "*held*" as much as \$1,750,000 of currency of both kinds. There must have been at these times \$950,000 of deposits, as the bank only had \$800,000 of capital uninvested in real estate. Are we to presume that the bank had loaned its "deposits," and kept its "capital," when on thirtieth June it only held \$920,000 of currency? The counsel for defendant assume that such was the fact, but there is no proof of it, and we think the fairer presumption would be that it loaned or used its "capital" and kept its "deposits." Nor does the fact that the president in his return reported no taxable capital materially affect the case, because it is fully offset by the fact that the assessor, (who under the law is empowered as a public officer to decide primarily) reported the bank as having \$700,000 of taxable capital. The presumption is that his report is true until disproved. We find no sufficient proof of the error to justify us in reversing the judgment of the court *a qua*. If the bank's capital was invested in United States bonds or currency and thereby exempt, the fact of such investment should have been affirmatively proved and not left to inference and doubt. Where one claims the

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benefit of an exemption, or that he is within an exception, it is his duty and the *onus* is on him, to make the facts appear clearly and distinctly upon which he rests his claim.

It is therefore ordered adjudged and decreed that the judgment appealed from be affirmed with costs of both courts.

ON REHEARING.

The opinion of the court was delivered by

EGAN, J. Since the former hearing of this cause the evidence has been supplemented by consent of counsel by the following which is accepted by both parties "as a correct statement of the average condition of the bank during 1875," the tax for which year is the matter in controversy:

Statement of the Affairs of the New Orleans Canal and Banking Company on Monday, June 28, 1875.

1. Real estate.....	\$182,516 85
2. Stocks.....	8,228 35
3. Taxes paid.....	14,431 65
4. Suspended debts.....	54,740 80
5. Foreign and domestic bills protested.....	26,949 73
6. Notes and bills discounted.....	1,833,146 41
7. Foreign and Domestic exchange.....	919,996 51
8. Interest due on loans on call.....	3,349 47
9. City seven per cent gold bonds (\$50,000).....	25,750 00
10. Cash items—	
11. Gold.....	\$32,419 80
12. Legal tender.....	974,777 17
13. Checks sent to Clearing-House.....	172,409 73
	————— 1,179,606 70
	\$4,248,716 47
14. Capital stock.....	\$1,000,000 00
15. Profit and loss.....	99,694 00
16. Dividends unpaid.....	46,556 00
17. Individual depositors.....	3,044,957 19
18. Foreign banks and banking.....	48,061 78
19. Circulation.....	9,447 50
	————— \$4,248,716 47

The amount invested in real estate, and which can not of course be taxed as *capital*, because taxed as real estate, appears from this statement to be \$182,516 85, or \$17,483 15 less than the amount allowed by

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the assessor on this account, so that, taking it from the original capital of \$1,000,000, there would be left \$817,483 15 of the original capital.

It is claimed by the defendant and may be, for the purposes of this case, conceded that the bank is not taxable upon its deposits because they represent not assets but liabilities and form no part of its capital proper. Does it, however, follow that it is not taxable on its otherwise taxable assets, because it owes at the time more to its depositors than it has funds in its vaults to meet on demand? If so, then the most solvent bank in the country, which by good management or good fortune has doubled its original capital, and by its charter or the consent of its stockholders (otherwise given) declares no dividend until the end of a term of years or until its final liquidation, but keeps reinvesting for profit its acquisitions as well as its original capital, would be exempt from taxation on that account if it had not always in its vaults the means of immediate payment of its deposits, when they equal or exceed the original capital, and we need go no further in the inquiry. This, however, is not pretended in the case at bar, in which the deposits or rather the amount due to the depositors is shown to be over three times as much as the original capital invested. The truth is that while deposits with a bank constitute to that extent debts or liabilities, all the assets of the bank, no matter of what they consist, provided only they be available, must be deducted from the amount of the deposits before it can be ascertained how much, if any, its capital stock has been diminished. Now, it needs no argument to demonstrate that deposits are made in whatever currency is accepted or created as a circulating medium at the time, say in the case at bar in legal tender notes of the United States, which are themselves exempted by law from taxation. Suppose then that three millions of dollars was so deposited with the defendant and that it had an equal amount of legal tender notes with which to meet the call of its depositors, will it be urged that because those notes are themselves exempt from taxation they should be counted and considered no part of the assets of the bank, notwithstanding they furnish the means of immediate redemption of its liabilities on this account, and that although the bank should do, what in law and good faith it is bound to do, and so long as it continues business must do—that is, should extinguish its liability for deposits by the use of the legal tender notes in its vaults; that its capital represented by the remainder of its assets, however large, and though in such form as not to be themselves non-taxable, shall not be taxed simply because its deposits being debts and not capital and its legal tender notes, which are exempt by the terms of the law, when added together aggregate an amount equal to or greater than the remaining assets of the bank, and therefore show an absorption of the

total capital? The fallacy of this reasoning becomes at once apparent when we see that in the case, put the bank might be able to repay its stockholders the amount of the capital stock and a large profit or dividend besides from other resources, after redeeming its entire deposits with the legal tenders which formed part of its available assets.

It is obvious from the statement furnished by the defendant and accepted by the plaintiff that the former invested its capital in something more than and other than greenbacks or legal tenders, and it is this excess, after deducting such property as is taxed in other forms, which the city claims the right to tax. Let us put the case in another form to test the correctness of this claim. The paid-up capital stock of the bank is one million dollars. On the faith of this and owing to the public confidence inspired by the character of its managers, three millions of dollars in greenbacks are deposited with it the moment it is opened for business, and that before it has had opportunity to invest or part with one dollar of its capital the whole amount of these deposits is recalled; now, according to the argument of defendant's counsel, you must add the exempted greenbacks to the exempted debts due the depositors, and thus make up a sum of exemptions of six millions of dollars, instead of permitting the one to do, as it does in point of fact; i. e., offset or pay the other. In the case put the bank would be left with its original capital (which is taxable by the very terms of the law) undiminished in the smallest degree, and shall not be taxed to the extent of a single dollar; and yet this would be the necessary consequence of the argument and of the reasons for exemption set up by the defendant's counsel.

The fact that the original capital of the bank, instead of being invested as in the case put, is invested in or represented by available securities which are not exempted from taxation, provided they be not themselves taxed in another form, only makes it come more strictly within the law subjecting it to taxation.

To make good the argument it is necessary that the entire capital of the bank should be invested in greenbacks and nothing else and that it should have no other means of redeeming its deposits.

Now, it may be conceded as before remarked for the sake of the argument, that neither deposits nor greenbacks should be counted in ascertaining whether and how far the defendant is taxable on its capital. But as the latter afford *pro tanto* a means of paying the former, on this theory the balance must be struck between them. The statement of the defendant, which is accepted by the plaintiff, shows what are put down as assets, \$4,248,716 47; from which deduct amount due depositors, \$3,044,957 19, less legal tenders, \$974,777 17 as stated, equal to \$2,070,-180 02, and we have a balance of \$2,178,536 45. But as the same legal tenders, already used to offset so much of the debts due depositors, also

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goes to make up the sum of the assets, they must be deducted from this balance, which leaves still.....\$1,203,759 28

From this deduct—

Amount invested in real estate and taxed as

such.....\$182,516 85

Taxes paid, which are not assets..... 14,431 65

Suspended debts, as per statement..... 54,740 80

Aggregating..... 251,689 30

Which taken from the last balance of assets leaves still.... \$952,069 98

Deduct further amount charged to profit and loss, \$99,694; amounts due foreign banks and banking, \$48,061 78; and amount of circulation, \$9447 50; aggregating \$157, 204 28, and we would still have a balance of \$794,865 70, or \$94,865 70 more than the amount for which the bank was assessed; add to this the suspended, but not necessarily non-collectible debts and not put down as such, which amount as per statement to \$54,740 80, and we have an excess beyond assessment of \$149,606 50, from which, treating it as a debt, deduct if you will amount of dividends unpaid, \$46,556, and we have still an excess of \$103,050 50. But in fact dividends are not properly debts, but only shares of profits; so that, even accepting the theory of the defendant's counsel, that "the capital of a bank like the capital of a merchant or individual consists of the value of its assets after deducting the amount of its liabilities, no error to the prejudice of the bank has been committed. To arrive at any other conclusion we would have to eliminate from its assets those which are most available and daily used to redeem its deposits; i. e., the currency in its vaults, although it may equal or even exceed those deposits; we should not only have to do this, but to go further and hold as insolvent a perfectly solvent bank, which, according to its own counsel, "declares annual dividends," and which, according to the statement furnished from its own books, had at its date declared a dividend of which \$46,556 remained still unpaid, and which dividends, in the very nature of things, are only derived and derivable from the profits in money on the stock invested, to say nothing of the actual value of its property and assets in other forms. It has, however, been expressly decided by this court that all moneys deposited in bank otherwise than as special deposits are its property, *in other words form part of its assets* (see 10 An. 343, and same 346), in other words its means of meeting its liabilities, whether to depositors or other persons, and also of paying any dividends or distribution of profits to its shareholders.

If those deposits or other funds which may be found in the vaults of the bank consist of non-taxable government notes the utmost limit of the decisions, both of our State courts and those of the United States to

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which we have been referred by the able and experienced counsel for the defense is that *so much* of the capital of the bank as is represented by such non-taxable notes is itself non-taxable, *and not that all its capital, no matter how invested, is non-taxable.* In one of those cases, reported in 9 Wallace, p. 357, the court said: "This capital may consist of cash or of bills and notes discounted and of real estate combined with them," precisely the case at bar, and again, "the *whole of it* may be invested in bonds of the government or in bonds of the State or in *bonds and mortgages,*" and a "tax upon this capital is a tax upon the bank."

In *Bank of Commerce vs. New York*, 2 Black, 620, a portion of the capital of the bank was invested in real estate and the balance in stocks, bonds, and securities of the United States, and it was held "*that such portion as was invested in government securities was not liable to taxation by the State.*" In the *Bank of New York vs. Supervisors*, 7 Wallace, 26, the court *maintained the exemption of so much of the capital of the bank as was invested in treasury notes or greenbacks.*

We are also referred to the case of *Home Mutual Insurance Company vs. City of New Orleans*, 20 An. 447, and *Cooley on Taxation*, p. 164, No. 1, as authority for the proposition that it is the actual and real capital of a corporation represented by the property in which it has been invested which is the subject of taxation, and not its merely nominal capital; and that if the capital be invested in non-taxable securities it is not taxable. That the plaintiff has followed the rule thus laid down so far at least as to endeavor to ascertain and to tax the actual and not the merely nominal capital of the defendant is apparent, as the tax is claimed not upon the nominal or fixed capital of the defendant of one million dollars, but upon its supposed actual capital of seven hundred thousand dollars. Both parties seem to agree to this standard of assessment.

We have been referred by defendant's counsel to the case of *Bailey vs. Clark et al*, 21 Wallace, p. 284, for the proper interpretation of the term "capital" in matters of taxation. In that case the assessor claimed that not only the fixed capital of the defendants employed in banking should be taxed, but that all moneys borrowed temporarily by them, from time to time, in the course of their business formed part of their capital stock, and was liable as such to taxation, and the court held that it was not.

The same principle is embodied in act of Congress passed in 1872, 17 Stat. at Large, p. 256, in regard to the tax imposed by the government of the United States, which is referred to by Mr. Justice Field in the case quoted. That learned judge gives a somewhat different interpretation of the meaning of the term "capital" in matters of taxation as applied to corporations, and one which is not exactly reconcilable with that announced in the twentieth Annual case and the authori-

ties before cited. He says, in the twenty-first Wallace case, that "when used with respect to the property of a corporation or association the term has a settled meaning; it applies only to the property or means contributed by the stockholders as the fund for the business or enterprise for which the corporation or association was formed;" and again: "We are satisfied that the term as used in the statute was intended to embrace only the fixed capital employed in the business of banking as distinguished from deposits and temporary loans made in the regular course of business." Burroughs on Taxation, p. 654, announces the same doctrine.

It is, however, needless for the purposes of the present case to attempt to reconcile these diverse definitions of what constitutes "capital" as an object of taxation, as the city concedes by not taxing it that the amount of fixed capital paid in by the stockholders is not the standard and only claims the right to tax the defendant on an amount less than that fixed capital by three hundred thousand dollars; a concession of which the defendant can not complain and against which no argument is urged based upon that ground.

This is, however, no longer an open question. The mode of assessment adopted in this case has prevailed in Louisiana since 1830, when that eminent Judge Porter announced it as the proper one in the case of the Louisiana Insurance Company vs. Morgan, 8 N. S. 631. Our predecessors reaffirmed that doctrine in the State vs. Louisiana Mutual Insurance Company, 19 An. 475, and in Mechanics' and Traders' Bank vs. City of New Orleans, 23 An. 307, in which case the precise point at issue in the case at bar was determined, the court saying that an entire exemption of its capital from taxation could not be claimed by the corporation, because *part of it was invested* in non-taxable securities. So also it is held under the revenue laws of the United States. See 21 Int. Rev. Rec. 353.

The case in 21 Wallace is relied upon by defendant's counsel simply to show that deposits are not liable to taxation, and it will be perceived from our computation that they have not been counted, but on the contrary *have been deducted* from the amount of "actual capital as represented by the property in which it has been invested" in accordance with the rule as announced by Judge Cooley, by the Supreme Court of the United States in the other cases cited, and by our predecessors in the twentieth Annual case. A review of all of these latter authorities makes it also apparent that while so much of the capital stock of a corporation as may be invested in non-taxable securities is itself non-taxable, even if that amounts to the whole of the capital of the corporation, it is not true that where such investment in non-taxable securities amounts to less than the amount of capital of the bank or other

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corporation the excess represented by taxable property of any kind is non-taxable. Indeed, this is practically conceded by the defense in the case at bar by the claim set up that the defendant always had on hand greenbacks or legal tenders enough together with the value of the real estate which is taxed as such to make up the sum of defendant's capital.

The error and the fallacy in the position of the defendant is that by reason of this fact entire exemption from taxation on its capital is claimed, notwithstanding its own statement shows a large amount of property or of "capital invested in and represented by property" *which is not non-taxable* or exempt under any provision of law; we need only instance one or two items in the statement, *i. e.*, "notes and bills discounted, \$1,833,146 41," "foreign and domestic exchange, \$919,996 51," an item of itself not very far short of the whole amount of legal tenders for which exemption is claimed. The city has not claimed or sought in the assessment complained of to tax the deposits of the defendant, *i. e.*, the debts due by it to depositors, which are strictly not deposits but *only the consequences of deposits*. Nor has it sought to tax the non-taxable government legal tenders in the vaults of the bank, as will be seen by recurring to the tabular statement already made by us in this opinion. All that the city claims, and we think correctly, is that though themselves non-taxable, these legal tender notes shall be counted as they are used and designed to be used as assets of the bank *for the purpose of offsetting and extinguishing so much of its indebtedness to depositors*, and that because so much of the capital of the bank is invested in non-taxable government securities, it does not follow that the remainder, which is not so invested, shall not be taxable.

Any other view would double in favor of defendant the amount of exemption; the legal tenders would be counted twice for that purpose—once because they are legal tenders, and once because they represent so much of deposits—while, if there is any force in the latter ground of exemption, it would only result that the legal tenders were exempted *not twice over* but for the *two reasons* urged by defendant's counsel, either of which if well founded will suffice, but not both with the effect claimed to duplicate the exemption.

While we do not for a moment argue, however, that deposits in the sense of *debts due depositors*, should be counted in estimating the real and actual capital of a bank for the purposes of taxation, neither are we prepared to give our assent to the doctrine that money in the vaults of the bank, *although derived from deposits*, is exempt from taxation for that reason alone. See Burroughs, p. 655, and *Milton vs. Savings Institution*, 17 Wallace, 109. On the contrary, we think it has been properly adjudged in the cases already cited to be the property of the bank.

We see no error in our former decree in this case, which is therefore ordered to be affirmed.

Eschert vs. Harrison.

No. 6784.

T. ESCHERT VS. W. C. HARRISON ET AL.

When the sheriff is not interested in an injunction suit, and is only connected with it by having had a notice served on him that the writ was suspended, he is not a necessary party to an appeal in such a suit.

The omission to state the day of the month in the date of an appeal bond, when the month and year are given, is supplied by the date of the filing of the bond.

Failure to set forth specifically the amount of an appeal bond is not ground to dismiss the appeal. It will be assumed that it was given for the amount prescribed in the order of court granting the appeal.

Indicating the clerk of the lower court, the payee in an appeal bond, by abbreviated signs is not fatal to the bond, if its recitals elsewhere make certain what court and clerk were meant.

The incompleteness of a record, caused by the loss of a portion of it, when the loss is properly certified by the clerk of the lower court, is not a sufficient cause for the dismissal of the appeal.

A PPEAL from the Fifth District Court for the parish of Orleans. *Columbia, J.*

Labatt & Clinton, for plaintiff and appellant.

G. L. Hall, for defendant.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

MANNING, C. J. The motion to dismiss is based on four grounds;

1. That all parties to the suit are not made parties to the appeal.

It is an injunction, and the sheriff is the party who has not been cited. A sheriff who is a party to proceedings by injunction only for the purpose of notifying him that the execution of the writ has been suspended, and who has no interest in the result, need not be made a party to an appeal from the judgment of the lower court. *Boguille v. Faille*, 1 Annual, 204. *Francis v. Scott*, 5 Annual, 668. *Boykin v. O'Hara*, 6 Annual, 115.

2. That there is no bond of appeal such as is required by law.

There is no date to the bond, no sum mentioned in it, and not the proper payee. The day of the month is not inserted, but the month and year are mentioned. The date of filing supplies the omission. The omission of the amount of the bond is not fatal. The bond is read in connection with the order of the court, and the law implies that it was given for the prescribed sum, although no specific sum is mentioned in it. This ruling is now too old to be disturbed. *Mason v. Fuller*, 12 Annual, 68. *Stille v. Beauchamp*, 13 Annual, 604. The payee of the bond is the clerk of the 5th Dt. Ct. parish of Orleans. The appellant says the Fifth District Court is meant by these abbreviations, and we regret that we are obliged to tolerate this careless and slipshod way of preparing legal papers, because in a subsequent part of the bond the

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names of the suit and court are properly recited, and render certain what court is meant.

3. That the record is incomplete.

The certificate accounts for the absence of a particular record by stating that it is lost. The clerk could nowhere find it, and the appellant cannot at this stage of the case suffer because of its loss.

4. That this court is without jurisdiction.

The sum claimed in the petition for injunction exceeds five hundred dollars.

The motion to dismiss is refused.

No. 6686.

STATE BY REL. HOYE & O'CONNOR vs. J. G. BROWN, ADMINISTRATOR OF
ACCOUNTS.

It is the duty of the judge of the lower court to fix the return day of an appeal, and if a wrong day is fixed by him, the appellant will not be prejudiced thereby.

Merely submitting to the execution of a judgment by the sheriff, is not such an acquiescence in the judgment as will debar the party cast from taking a devolutive appeal.

No *ex parte* statement, or motion, by one of the parties to a suit, made in the court below, can impair the other party's right of appeal.

A public officer who has done a certain act he was ordered to do, by a decree of court in a mandamus proceeding, may take a devolutive appeal from the decree, when the act done in obedience to the decree is susceptible of being effectively undone.

A PPEAL from the Third District Court, parish of Orleans. *Monroe,*
J.

B. F. Jonas, City Attorney, for defendant and appellant.

Hornor & Benedict, for plaintiff.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

SPENCER, J. Relators proceeded by mandamus to compel the defendant to register a certain judgment obtained by them against the city of New Orleans, and to issue them thereon certain cash warrants.

Upon trial the mandamus was made peremptory. Thereupon the defendant applied for and obtained an order for a suspensive appeal without bond, under the act exempting the city of New Orleans from giving bond. On motion we dismissed that appeal, holding that the city of New Orleans was alone entitled to said exemption, and that the city was no party to this suit.

On motion of relators, in the court below, and on suggesting that said suspensive appeal had been dismissed, and that said decree was now

final, and further that the defendant refused to obey the mandamus, it was on first May 1877 ordered that defendant show cause why he should not be punished for contempt.

On same day defendant answered stating that he had complied as far as possible with the mandate and registered the judgment, etc. On fifteenth May 1877 the defendant applied by petition for a devolutive appeal, which was granted on bond and made returnable on first Monday of June 1877. On twenty-first May 1877 on motion of relators and on suggesting that a compromise had been effected herein, it was ordered that satisfaction of the decree be entered of record. This order appears to have been rendered *ex parte* by the court *a qua*. That devolutive appeal is now before us. The record thereof was filed in this court thirty-first May 1877.

Relators move to dismiss on the grounds

First—That by act forty-five of 1870, extra session, regulating appeals, it is provided, “all appeals from the parish of Orleans * * * shall be returnable on the first and third Mondays of each month of the session” of the Supreme Court. That by law the session of said court at New Orleans ends on the last of May and that therefore an appeal taken on fifteenth May should have been returnable on the first Monday of November.

The law imposes on the judge the duty of fixing the return day, and the appellant can not be prejudiced by his mistakes. If the first Monday of November instead of June was the proper return day—the court not being in session at the latter date—and if the appeal was filed in this court before either day arrived, we can not surely accuse the appellant of want of diligence and see no possible injury to appellee.

Second—The second ground of dismissal is that the defendant has compromised the judgment and acquiesced therein as shown by relators’ motion and the order entering satisfaction.

A judgment is rendered, suspensive appeal taken and dismissed, execution issues and satisfaction of judgment obtained by legal process! Defendant takes a devolutive appeal and is met with the objection that he can not appeal, that the judgment has been satisfied! The case before us is even stronger. The defendant had to satisfy the judgment or go to jail. There is not here the acquiescence which the law contemplates. It must be the voluntary act of the debtor. Besides the *ex parte* statement in relators’ motion, filed after the appeal, can not be noticed. If the right to a devolutive appeal can be thus defeated, it would be, in most cases, a delusion and a snare.

Third—The third ground is that a devolutive appeal will not lie from a decree granting a mandamus; and we are referred to the case of the “State ex rel. Clay vs. Johnson, Auditor” (not reported yet) wherein it

State ex rel. Hoey & O'Connor vs. Brown.

seems some doubt was expressed by this court as to defendant's right to such appeal in such cases. Whatever doubts may have been suggested or expressed in that case or any other, we have no doubt of the existence of the right in the present case.

The defendant is a public officer, charged with responsible duties, and under heavy bonds to the city for the faithful performance thereof. He has been ordered to register a certain judgment against the city, and compelled to issue to relators certain warrants for money. He has a right to protect himself, his sureties and the city from this decree if erroneous. If it were manifest that the appeal would be a vain thing, because the things done in execution of the judgment were of a nature not to be undone—were of a nature that once accomplished they could not be relieved against, perhaps it would be true to say no devolutive appeal would lie, for courts are instituted to grant relief and enforce rights, and where these purposes are not attainable they would properly decline to enact a farce. But in the case before us, if we find the decree appealed from to be wrong, we can reverse it, and the city could cause the registry to be canceled and recover back the warrants or money paid.

The motion to dismiss is overruled.

No. 6696.

STATE EX REL. WILLIAM HENRY VS. THE MAYOR AND ADMINISTRATORS OF
THE CITY OF NEW ORLEANS.

An act of the Legislature proposing an amendment to the constitution has, before it has been ratified by a vote of the qualified voters of the State, no effect whatever.

The amendment of the State constitution, adopted by the popular vote in November 1874, which forbids any increase of the debt of the city of New Orleans after the first of January 1875, did not design to prevent the payment of any pre-existing legal debt of the city, in the way stipulated in the contract creating the debt.

No State has the power, either by legislative enactment, or by amendments of her constitution, to impair the obligation of pre-existing, valid contracts.

When a municipal corporation has legally contracted for certain work to be done, and to be paid for in a certain specified way, the corporation may, on the completion of the work, be compelled by mandamus, to carry out the stipulations as to payment contained in the contract.

A PPEAL from the Third District Court of the parish of Orleans.
Monroe, J.

S. P. Blanc, for plaintiff and appellee.

B. F. Jonas, City Attorney, for defendant.

The opinion of the court was delivered by

MARR, J. On the twenty-third April, 1874, the city of New Orleans, by

State ex rel. Henry vs. the Mayor and Administrators.

authority of an act, No. 48, approved thirteenth March, 1871, and of certain city ordinances, entered into a contract with relator, William Henry, for the grading and shelling of a part of Henry Clay Avenue.

By the terms of this contract a part of the price was to be paid by the city, and a part by the owners of the property fronting on the avenue. The portion exigible of the city to be paid in street improvement bonds, and the portion exigible of the front proprietors to be paid in assessment bonds, having ten years to run, and bearing interest at seven and three-tenths per cent per annum: "with the distinct understanding that these bonds shall be taken and accepted by said Henry at the rate of seventy-five cents on the dollar."

Henry completed the work, according to his contract, and to the satisfaction of the city authorities; and the entire contract price seems to have been paid except the sum of \$943 08, due by two front proprietors for their proportion, for work completed and accepted by the city on the twenty-sixth May, 1874. The object of this proceeding is to compel the Mayor and Administrators by mandamus "to proceed by ordinance or other appropriate action, to assess and levy against the property aforesaid, and the owner and owners thereof, according to the provisions of the act No. 48, of 1871, a sum sufficient to meet and cover the bonds to be issued to relator, and to issue "Street Assessment Bonds," in amount sufficient to pay him at the rate of one dollar in bonds for every seventy-five cents of his claim and certificates," in accordance with the act No. 48, of the Legislature, and the contract between relator and the city.

The Mayor and Administrators answer that since the date of the contract the constitutional amendment embraced in act No. 22, of 1874, has been adopted, which prohibits the city of New Orleans and its officers, from issuing any evidence of indebtedness or warrant for the payment of money except against cash actually in the treasury; and that, therefore, respondents have no authority and are expressly forbidden to issue bonds as asked for by relator.

They state, further, that at the time of making the contract with relator, he was well aware of the adoption of the act No. 22, of 1874, by the Legislature, and knew that it would, if ratified by the vote of the people, prohibit the Council from issuing the bonds described in the contract.

The judgment of the court below granted the mandamus as prayed for, and the Mayor and Administrators appealed.

We attach no importance to the statement that relator was aware of the proposed amendment to the constitution at the time the contract was entered into; because the other contracting party had the same information on that subject, and neither could have known that it would

be adopted. They attached no importance to it, because there is no provision in the contract by which the relator could compel payment otherwise than by the assesment bonds: and it is to be presumed that neither party understood that an amendment to the constitution could retroact so as to destroy contracts entered into and fully executed by one of them at the time of its ratification.

The simple question is, does this amendment, which was ratified at the election in November, 1874, relieve the city of its obligation to comply with the contract in question, by issuing to relator the bonds which he bound himself to receive for his work.

The object of this amendment is manifest: "The city of New Orleans shall not hereafter increase her debt, in any manner or form, or under any pretext." To enforce this, "After the first day of January, 1875, no evidence of indebtedness or warrant for the payment of money shall be issued by any officer of said city, except against cash actually in the treasury; but this shall not be so construed as to prevent a renewal of matured bonds at par, or the issue of new bonds in exchange for other bonds, provided the city debt be not thereby increased," etc.

Now, it is evident that this article intends to prevent the increase, only, of the city debt; and that it does not contemplate nor prohibit the payment by the city of its then existing debt. We do not think that the assesment bonds in question can be considered as either evidences of indebtedness or warrants for payment of money, within the true intentment and meaning of this article; but we shall not enter into any further discussion of this question, because we do not deem it necessary for the decision of this case.

The constitution of the United States, the supreme law of the land, article one, section ten, clause one, declares that, "no State shall pass any law impairing the obligation of contracts." This prohibition is addressed to States; and it is applicable to the States, whether exercising, through their Legislatures, ordinary law-making power, or, by conventions or other delegated authority, or in their aggregate capacity, adopting or amending their organic laws. Obviously, the prohibition would be ineffectual if it were restricted to laws passed by the State Legislatures. Reason and authority require that it shall extend to, and strike with nullity every law, whether legislative or organic, by which the obligation of pre-existing contracts is impaired. In *Cummings vs. Missouri*, 4 Wallace, 277, a clause in the constitution of the State of Missouri, which was in violation of that part of article one, section ten, clause one, of the constitution of the United States, which provides that no State shall pass any *ex post facto* law, was held, by the Supreme Court of the United States to be inoperative and void.

If, as we think, the correct interpretation of the amendment to the

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constitution of Louisiana was not intended to prevent the payment, by the city, of its pre-existing debts, in the manner stipulated and fixed in solemn contracts, the relator is entitled to the remedy and relief which he seeks. If, as the city authorities interpret this amendment, it prohibits a compliance by them with its pre-existing obligations and contracts, the effect in this case would be, not merely to impair the obligation of the contract, but to destroy it, and to leave the relator without remedy, without the means of enforcing payment for work performed by him, in strict accordance with his part of the contract, completed before this amendment was ratified. There can be no doubt that thus interpreted, this amendment would be in flagrant violation of the constitution of the United States, article one, section ten, clause one, and to that extent would be inoperative and void.

It is clearly the duty of the Mayor and Administrators to pay the relator for his work, in the manner and on the terms stipulated in the contract under which the work was done; and the district judge so decided, in an elaborate and exhaustive opinion.

The judgment appealed from is therefore affirmed with costs.

No. 6718.

SAMUEL LAWSON ET AL. VS. ZACHARIAH BRUEN.

The answer filed in a suit by a defendant admitting that he had in his hands a specific fund, for distribution among certain creditors; and that the plaintiff "appeared" to be one of those creditors, with the first preference claim on said fund; but asking that all of said creditors be cited as *in concurso*; and expressly setting up the plea of general denial, can not be construed as involving a confession of judgment in favor of the plaintiff; although he may have the ranking lien on the fund in the defendant's hands.

An appeal will not be dismissed on the ground that the appellant confessed judgment in the court below, when he contests the confession, and it seems to be the only ground of the judgment.

A PPEAL from the Fifth District Court, parish of Orleans. *Rogers,*
J.

Richard DeGray, for plaintiff and appellee.

B. C. Elliott, for defendant.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

SPENCER, J. This motion to dismiss is based upon the allegation that the judgment appealed from was rendered on the confession of the defendant. The facts are these: Bruen held the first mortgage on certain property of one Moran and seized and sold it. After satisfying Bruen's claim and all prior liens and expenses, there remained for distribution to subsequent mortgages \$3788 96, which the purchaser Bruen

Lawson vs. Bruen.

retained, as shown by the sheriff's deed. These subsequent mortgages, as certified by the recorder of mortgages were:

First—A general mortgage in favor of Prathers, recorded twenty-fourth of July, 1873.

Second—A general mortgage in favor of Lawson, recorded second of April, 1874.

Third—A general one in favor of A. B. Miller, recorded twentieth of February 1875.

Fourth—Another general one in favor of Bruen, recorded September 3, 1875.

Fifth—Another general one in favor of Prathers, recorded sixteenth of September 1875.

One of the lots had been sold for State taxes and bought by one Norcross; the purchaser taking the property subject to right of redemption out of the fund so left in his hands.

The estate of Simonds also had a claim of some sort on the property or its proceeds, and one Miss Annie Crowley claimed to have purchased it of said Moran.

The plaintiff Lawson, alleging that he had given the usual notices, brought this hypothecary action and prayed that Bruen be condemned to pay the amount of his mortgage, or surrender the property to be sold to pay it.

Bruen after filing sundry exceptions, answered in substance as follows on thirtieth April 1877:

First—A general denial of all plaintiff's allegations not specially admitted.

Second—He admits the sale of the property to him, and that after satisfying his claim and prior ones there remained in his hands the sum stated \$3788 96.

Third—He then proceeds to show that he had paid and had been legally subrogated to the mortgage of Prathers, which was next in rank; that he had paid a certain amount in redemption of the lot sold for taxes, and had paid certain other taxes etc. He then says: "*After these proper deductions, there remains subject to claims of the other creditors of William Moran, of whom the plaintiff Lawson appears to be first in rank, and to all others in interest the sum of \$2640 87.*" He then further alleges that the mortgage certificate shows the existence of several mortgages subsequent as stated; that it was claimed that Miss Crowley had purchased the property and was entitled to the surplus proceeds; that the estate of Simonds had a claim of some kind thereon of a character unknown to him, and that William Moran had been interdicted. He alleges that he can not be bound for more than the price of his purchase and that all parties having any interest in the balance of the price, should be brought

into court, as *in concurso*. Wherefore he prays their citation accordingly; that he be allowed to deposit the amount due by him in court and thereupon that his property be released from all said mortgages, etc.

On the second of May, 1877, plaintiff took a rule on defendant to show cause "why judgment should not be entered in his favor as in said petition prayed for, to the extent of said amount admitted in defendant's answer to be due, to wit, \$2640 and costs of suit."

On the third of May the court ordered all said parties named in defendant's answer as interested, to be cited as *in concurso* as prayed for by the answer.

On the seventh of May the above rule was tried.

On the fourteenth and fifteenth of May the parties cited by defendant *in concurso*, appeared and filed various exceptions against plaintiff and defendant.

On the sixteenth of May the court sustained plaintiff's rule and ordered "that judgment be rendered herein in favor of plaintiffs, as prayed for, to the extent of the amount admitted to be due herein, to wit: \$2640 and costs, and that the defendant Bruen pay the same or that he deliver up the mortgaged property etc. to pay and satisfy the mortgaged debt."

This judgment was signed June 16, 1877.

Defendant took a suspensive appeal, which plaintiff now moves to dismiss as stated.

To justify the judgment appealed from, the answer must have confessed four things:

First—That Lawson was a creditor of Moran.

Second—That he held the first and preferred mortgage.

Third—That due demand had been made.

Fourth—That defendant detained the property subject to the mortgage and that it was liable in his hands for the amount of the judgment.

Now what is the defendant's answer—what his admission or confession? It is a general denial, and admission, that he has in his hands \$2640 87 "*subject to the claims of the other creditors of Wm. Moran (of whom the plaintiff Lawson appears to be first in rank), and to all others in interest*"—that there appeared to be conflicting claims upon said fund and that all parties in interest should be cited *in concurso* and heard and he allowed to deposit the amount in court. He no where admits that Lawson was a creditor of Moran. On the contrary he enters a general denial to all plaintiffs' allegations which certainly was enough to put plaintiffs to the proof of their claim against Moran and of the demand required by law to precede his action. This judgment was entered up, without proof, on motion and as upon confession. The admissions in the answer did not warrant the judgment.

True the judge *a quo*, rendered it as on confession, but he did so ille-

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gally, since as we hold there was no basis for it. To deny the defendant's right of appeal, to test the question whether his answer was a confession, would be to deprive him of his rights without trial. The very question which we will have to decide when this case is heard, is whether the defendant did or did not confess, and that same question is raised by this motion to dismiss. In order to determine the right of appeal, we must of necessity decide whether the judgment was confessed by appellant, and as the judgment has no foundation except the alleged confessions, it would seem that in deciding that the right of appeal exists, we virtually decide that the judgment appealed from is invalid. In other words the motion to dismiss raises the only question involved in the case. It would have been better to have submitted the case on the motion and merits together. At all events we hold that the defendant has the right to have this court determine whether or not the admissions and confessions contained in his answer authorized the court *a qua* to enter up, on motion and without proof, a final judgment against him for \$2640.

The motion to dismiss is overruled.

No. 6735.

STATE EX REL. PAUL DOULLUT vs. JUDGE OF THE SIXTH DISTRICT COURT,
PARISH OF ORLEANS.

A suspensive appeal will not lie from an order granting an injunction, when it does not clearly appear that the injury complained of as arising from the injunction is irreparable; such as the appeal on the merits can provide no adequate remedy for.

A suspensive appeal will lie from an order of court, which rescinds a previous order of the court setting aside a writ of injunction on bond.

APPLICATION for writs of mandamus and prohibition.

A. & W. Voorhies, for relator.

E. H. Farrar, for respondent.

The opinion of the court was delivered by

SPENCER, J. The suit of "A. Saulet et al. vs. Paul Doullut," is a suit to restrain and enjoin the defendant from carrying on a tallow factory in the Third District of New Orleans, on the ground that the same is a nuisance. Plaintiffs pray that an injunction issue against defendant, which upon their oath, and bond, for \$300 the court granted. This injunction was granted on the *ex parte* showing of plaintiff's petition and oath.

Defendant thereupon made an *ex parte* application to set aside said

29	869
46	86
29	869
52	1278

29	869
121	187

injunction by bond, under article 307 of the Code of Practice. The court granted this order, setting aside the injunction on defendant giving bond for \$500, which was accordingly given.

Thereupon the plaintiffs, alleging that the acts complained of and enjoined were calculated to work them an irreparable injury took a rule on defendant, to have the order to bond the injunction, rescinded, as having been improvidently granted. Upon trial this rule was sustained and the order permitting the bonding was rescinded and set aside.

Thereupon, and within ten days from the date of the original order of injunction defendant moved for a suspensive appeal from both orders to wit:

First from the original order of injunction and second from the order rescinding the order permitting the bond.

The judge refused an appeal from either order, and the defendant is before us applying for writ of mandamus to compel the granting of the appeals and for writ of prohibition.

We think he can not appeal from the first, but can appeal from the second of said orders.

First—The record of appeal from the original order granting the injunction could not legally contain any thing except plaintiff's petition, affidavit and bond. No proceedings subsequent, could be reviewed on said appeal, for we would have to pass upon the case just as it stood when the district judge passed upon it, in order to decide whether he rightfully or wrongfully granted the order. In other words the question presented to us would be, whether or not, on the face of papers, taking all plaintiffs' allegations as true, they were entitled to the injunction prayed for. So that the case would present substantially the same phase, as if an appeal were asked from an order overruling an exception of "no cause of action." This court held in *Osborne vs. Clayton* 3 R. 437 that "no appeal will lie from an order, discharging a rule to show cause why an injunction should not be dissolved on the ground that the petition set forth no legal cause for issuing it. That it is an interlocutory order and works no irreparable injury, and if erroneous it may be corrected by appeal from the final judgment."

We do not think the law, in giving the right of appeal from interlocutory orders, contemplated extending it to original orders granting the conservatory writs of injunction, attachment, etc. The indemnity which the law provides for defendants in these cases against damage and injury is supposed to be sufficient to prevent the injury being "irreparable," even if such original conservatory orders can be considered as "interlocutory." If the bond given by the plaintiffs in such suits is not good and sufficient to indemnify the defendant against any loss and injury he may sustain, the law provides him a remedy, by motion, to

compel the giving of good security. Should the judge wrongfully refuse to grant such order, the party would have the right to appeal from the order refusing it. *Poydras vs. Tusson*, 3 La. 443.

We think appeals from "interlocutory orders" should only be granted when the injury therefrom comes with reasonable certainty under the head of "irreparable;" for such appeals tend greatly to the delay and expense of litigation. If substantial relief from the injury done by the order can be obtained on appeal from the final judgment, the interlocutory order should not be appealed from.

Second—As to the right of appeal from the second order above named, that rescinding the order to bond the injunction, we think our predecessors have settled that it exists, though if discussed as a new question it would be, we think, very questionable. 12 An. 455; 3 R. 102; 11 R. 452.

The effect of the order rescinding the previous order to bond is the same as if the original application to bond *had been refused* in the first instance. In "*State ex rel. Barthe vs. Judge of Superior District Court*," 28 An. 903, a case involving the precise point, our predecessors held "that an appeal will lie from an order refusing to allow the release on bond, under article 307 Code Practice, of an injunction." See also 28 An. 880 and 889.

It is therefore ordered and decreed that the mandamus and prohibition herein be made peremptory in so far as relates to the order rescinding the order to bond the injunction, and that in other respects they be refused.

DISSENTING OPINION.

EGAN, J. I concur in so much of the opinion and decree of the majority of the court as holds the relator not entitled to an appeal from the order of the district judge granting the injunction complained of, and dissent from so much of the opinion and decree as holds the relator to be entitled to an appeal from the order of the district judge rescinding an order permitting him to dissolve the injunction by giving bond under article 307 of the Code of Practice. All the reasons which exist for denying the right of appeal in the one case, attach with equal or greater force in the other, and are involved in it. If the relator can not appeal from the order granting the injunction, because, if wrongfully issued, he is protected by the bond of the plaintiff, and may obtain relief upon final judgment, or upon appeal from final judgment in the cause, it is difficult to perceive wherein he can not in the same manner obtain relief from the interlocutory order, the effect of which is to reinstate, or to leave the injunction in force. The general rule has been often announced by this court to be, that where a party may be compensated in

State ex rel. Doullut vs. Judge of Sixth District Court.

money in the same action, the injury is not irreparable, and an appeal will not lie from an interlocutory order, and so I understand the majority of the court to hold on the other branch of this case. See 12 R. 488, 2 An. 321, 4 An. 147, 12 An. 455. In the case of Osborne vs. Clayton, 8 R. 437, it was held that no appeal will lie from an order discharging a rule to show cause why an injunction should not be dissolved on the ground that the petition set forth no legal cause for issuing it; that the order which was interlocutory worked no irreparable injury, and, if erroneous, might be corrected by appeal from the final judgment. The law is correctly stated by Chief Justice Merriek in White vs. Cazenave, 14 An. 57, to be that the law (C. P. 307) "only confers on the district court the discretion to dissolve an injunction on the defendant's giving bond *when the act prohibited is not such as may work an irreparable injury;*" and that when the district judge, through error, embraces as within this article a case not contemplated by it, one where the prohibited act may work an irreparable injury, an appeal must lie (*in favor of the plaintiff*, not the defendant in injunction) by the express terms of article 566 of the C. P. The same doctrine was held in Delacroix vs. Villeré, 11 An. 39, and in a number of cases before and since. In the 14 An. case quoted, the learned judge said: "The question must be determined by the facts and circumstances of each case," so that no authority in favor of the relator here can be derived from the cases decided by our predecessors and reported in 28 An., and quoted in the opinion of the majority of the court which were decided upon their own peculiar state of facts.

Only one of these cases, the State ex rel. Barthe vs. Judge of the Superior District Court, p. 903, has any similitude to that now under consideration, and the opinion, which is very short and unsatisfactory, gives evidence of hasty preparation, as it is evidently based upon the erroneous belief of the judge who rendered it, that "*it has frequently been held* that an appeal will lie from an order refusing to allow the release on bond under article 307 of the Code of Practice," and as further stated in the opinion that "the relator *had an absolute right* to an appeal from the judgment complained of, notwithstanding the terms of the article of the Code of Practice, and the decisions of able judges in the past hold the right of appeal from interlocutory orders to be very far from absolute, and make even the exercise of the legal discretion to grant an appeal from such orders, depend upon the particular facts of each case, while the current of authority and the reasons for it are against the absolute right. Indeed, the cases are exceptional when it is allowed.

The judge has not favored us with any reference to the cases in which it has been so "*frequently held,*" and neither ourselves nor our learned brother who prepared the opinion of the majority of the court in the case at bar have been able to find them. The only other case in the same

volume which bears at all upon the questions involved in the present case is reported on page 889, 28 An. So far from being in any degree favorable to the relator it only supports the views expressed in this opinion and those announced in the older cases quoted in it to the effect that this court may, *at the instance of the plaintiff in injunction*, compel an appeal from an order of the district judge dissolving an injunction on bond. The case was an injunction against an order of seizure and sale. The injunction was dissolved upon the bond of the seizing creditor, and the judge below having refused the plaintiff in injunction an appeal from the order of dissolution was compelled by this court to grant it. The effect of the dissolution would otherwise have been the alienation under the writ of the property seized. The decision was right.

In the fourteenth Annual case before cited, the Chief Justice was applying the principles announced by him to the right of the plaintiff in injunction to appeal from an order dissolving on bond, and went so far as to say that "in order to test the plaintiff's right to appeal, we are forced to consider whether the court erred in granting the order. If it did err, an appeal lies by the very terms of articles 307 and 566, C. P. *If it did not err the appeal must be dismissed.*" And again, he says: "In the consideration of the question before us, the *allegations of the plaintiff's petition must be taken as true,*" a proposition about which there can be no question and one which is recognized by the majority of the court in the case at bar in the reasons given for refusing the right of appeal from the order granting the injunction. Applying this principle to the present case, what are the facts or the allegations of the petition for injunction from the effects of which, pending the cause, the relator seeks relief through an appeal *from the refusal of the judge to permit him to continue to do the acts from the doing of which he is enjoined by the simple execution of an obligation to compensate in money for committing a nuisance*, for as such it is characterized and described in the plaintiff's petition, which, for the purposes of this inquiry, must be taken as true. In the case of *Fuseller vs. Spaulding*, 2 An. 773, it was properly held that the burning of a brick kiln near a dwelling, exposing it to danger, and seriously incommoding the occupants and endangering the health of plaintiff's family, may be enjoined.

In the case of *Marion vs. Johnson & Rendall*, 22 An. 512, the court held that in determining the question whether acts complained of will work an irreparable injury to the plaintiff, on the trial of a motion to dissolve an injunction on bond, all the allegations of the petition for injunction must be taken as true, and *if the facts set up show trespass on real property, which if continued would change the possession of it, the motion to bond under article 307 will be overruled because an irreparable injury would be done the plaintiff*. In that case the plaintiff had

appealed from an order permitting the defendants to dissolve the injunction on bond, and the motion to dismiss the appeal was overruled, the order to bond set aside, and the *injunction reinstated*. The counsel for plaintiffs argued and the Supreme Court thought that by permitting the defendants to release the injunction on bond the district judge *had licensed a trespass*. The district judge, in the case at bar, had, by the order of dissolution on bond, in effect *licensed a nuisance*, as appears by the face of the papers by which the question must be tried. This was evidently done through error and inadvertence, and he very properly sought by the order of rescission to recall the error and reinstate the injunction. Had he failed to do so, the plaintiff in injunction under the authorities cited might, and no doubt would, have appealed, and thus corrected the error first committed by the district judge. It does not, however, follow that the defendant can appeal from the order rescinding the order to bond and reinstating the injunction. I think this order rests upon precisely the same basis in the present case with the order granting the injunction, and that it can not be appealed from. If the facts alleged are untrue and the injunction has been wrongfully sued out he will be permitted and enabled to show it on the trial of the case and to obtain such damages as he may meanwhile have suffered (see 12 An. 455); but if, on the contrary, the injunction was rightfully sued out, which we must assume till the contrary is shown on the trial, he can not be permitted to avoid or suspend its effects either by bond for dissolution or by appeal.

Who can recall or repair with money the effect of a continuing nuisance to the health and comfort of plaintiff, his family, and of the public of whom he is one, if it, indeed, be so as charged in the petition for injunction; and what is the effect of allowing an appeal in this case to the party enjoined, if it be not to permit him to continue to commit and keep up the nuisance complained of during the pendency of appeal, however long.

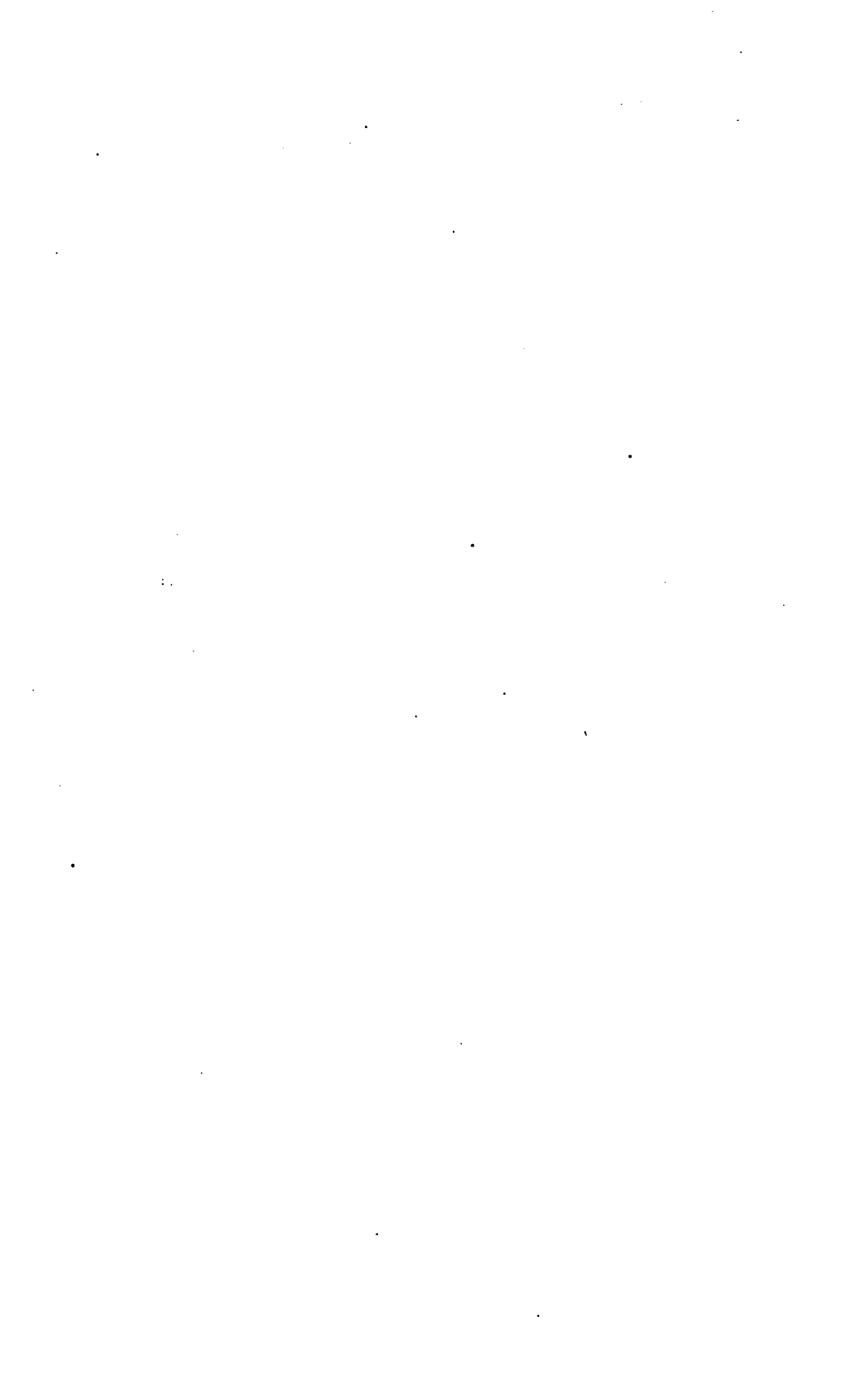
In *Jure vs. First Municipality*, 2 An. 322, the absolute right of appeal was denied even to the plaintiff, and we may paraphrase in this case the language of Judge Slidell in that by saying that the very object of the injunction would be defeated if the relator were premitted to suspend its operation by an appeal.

It seems to me that article 307 of the Code of Practice was provided for no such purpose or case, and that we are compelled to look into the facts of the particular case in order to determine whether or not the right to bond and consequently the right to appeal exists. I think the one depends upon the other and that neither exists in the present case. It may not be amiss to remark that it is a necessary corollary from the argument and authorities that the right of appeal may well exist in

favor of the party enjoining an act alleged to work irreparable injury and not exist in favor of the party committing the act, and so with all the cases of appeal which are to be found in the books with the exception of that in the twenty-eighth Annual, decided by our immediate predecessors, the incorrectness of which has been already discussed.

This case is different even from an appeal from a refusal to order the release on bond, for in that case the injunction would remain operative and the nuisance could not be continued during the pendency of the appeal, while in the case at bar, which is an application to compel the granting of appeal from an order rescinding an order allowing the defendant to release the injunction on bond, the effect of granting the appeal necessarily is to continue the existence of the nuisance pending appeal. This effect can not be remedied or recalled. The consequences to the plaintiff and the public might be too serious; and, however little disposed to restrict the right of appeal, I do not think the law gives it, and I can not consent to give it in this class of cases.

For these reasons I dissent from the conclusions of a majority of the court.



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Cooley vs. Broad, 345.

The admission of the alleged agent that he is authorized to represent a third person in a suit, does not prove the agency.

The authority to represent a defendant in a suit must be shown expressly, or by irresistible implication.

Mrs. Marie E. Dawson vs. Marie Landreaux, 363.

Where a principal has dealt with a merchant through an agent acting under a written power of attorney, the merchant may prove by parol the correctness of his account, and any acknowledgment of its cor-

AGENCY—Continued.

rectness, or any ratification of it by the principal, even if the agent has transgressed his mandate, or there are charges in the account which could not be legally enforced.

Ratification by the principal of the unauthorized acts of an agent makes those acts binding on the principal.

A power of attorney sufficiently comprehensive to authorize the agent to manage a plantation, and disburse the proceeds of its crops, will justify the factor who sells the crops to pay out their proceeds on the orders of the agent.

G. W. Sentell & Co., in Liquidation, vs. Mrs. M. G. Kennedy and Husband, 679.

A principal who employs an agent to do a legal thing, is not liable in damages for any illegal act of the agent done in the execution of the mandate, to which the principal was not accessory, or privy.

Andreas Richoux vs. Mayer Bros., 828.

ANSWERS.

SEE PRACTICE.

APPEAL.

What new Pleas and Evidence may and may not be made on Appeal.

A plea of adjudication or discharge in bankruptcy can not be originally set up in this court. Such plea must be expressly made in the court below, else this court will refuse to take cognizance of them.

Serra é Hijo vs. Hoffman & Co., 17.

The exception of *lis pendens* will not be considered in this court, unless raised in and passed on by the court *a qua*.

State ex rel. Comminge vs. Judge of the Superior District Court, 360.

Evidence to support a motion to dismiss an appeal on the ground of acquiescence of appellant in the judgment, may be filed any time before the case is submitted.

If an *issue* is made, as to whether appellant has acquiesced in the judgment, it must be passed on by the lower court before this court will consider it.

Evans & Taylor vs. Succession of A. M. Etheridge, 576.

The sufficiency of a surety on an appeal bond will not be considered here when not put at issue, or passed on in the court below.

Elizabeth Edwards and Husband vs. Edwards, 597.

The appellate jurisdiction of this court is not divested by the fact that, pending an appeal in any particular case, the appellant has become a bankrupt. In passing on the question of their appellate jurisdic-

APPEAL—Continued.

tion, this court will consider no fact which does not appear in the transcript of appeal.

J. Davidson Hill & Co. vs. Mrs. Adelaide Bourcier and B. M. Pond, 841.

A claim not set up in the pleadings will not be allowed by this court.

Gordon & Gomilla vs. Wright & Clark, 812.

Right of Appeal as Affected by the Amount Involved.

Where, in claim for damages, based on a wrongful deprivation, or obstruction of some mental or moral gratification, or personal convenience, the plaintiff makes oath that his interest involved in the controversy amounts to more than five hundred dollars, it will suffice to give this court jurisdiction.

Nicholas Burke vs. James Wall et al., 38.

If the real amount involved is under five hundred dollars, this court is without jurisdiction.

Succession of Mrs. E. R. Hardesty, 289.

The amount to be distributed in the homologated account of an administrator, and not the amount claimed by the appellant, determines his right of appeal.

Succession of Cloney, 327.

Where the matter in dispute is over five hundred dollars this court has jurisdiction.

Elizabeth Edwards and Husband vs. M. A. Edwards, Administrator, et al., 597.

Appeal Bonds and Sureties on Same.

Where the appeal bond is made in favor of the appellee instead of the clerk of the court, it will, on motion to that effect, be dismissed. Nor will any surreptitious interlineation of the bond, made after the motion to dismiss, by which the clerk is substituted for the appellee, avail to prevent the dismissal of the appeal.

Josephine Johnson vs. Clarke & Meader, 289.

When the judgment appealed from does not condemn the defendant to pay any specific sum, the amount of the appeal bond must be fixed by the judge *a quo*.

Succession of Mrs. E. R. Hardesty, 54.

When the judgment does not condemn the defendant to pay a certain sum, or do a certain act, the bond for a suspensive appeal must be fixed by the judge, and need only cover costs.

John Untereiner vs. William Miller et al., 435.

The bond for a suspensive appeal from a money judgment must exceed by one half the principal and interest due, at the date of the judgment. The court can not fix it for any less amount.

APPEAL—Continued.

The surety on an appeal bond must reside within the jurisdiction of the court, and be amenable to its process in case any action against him on the bond should be had, and have property over and above any incumbrances on it equal in value to the amount for which he is bound.

State ex rel. Thomas Jorda vs. the Judge of the Fourth District Court, 776.

The bond for a suspensive appeal from a judgment dissolving an injunction, need only be for an amount that shall exceed by one half the damages decreed by the judgment of dissolution, and costs.

F. C. Malain et al. vs. the Judge of the Third Judicial District, et al., 793.

The failure of an appellant to obey an order of the lower court to substitute a solvent for an insolvent surety on his appeal bond, will work the dismissal of his appeal.

A. P. Dumas vs. Aristide Mary, 808.

When an additional party is made to an appeal after the execution of the appeal bond in favor of the clerk, a new bond is not necessary.

On such a bond all parties to the appeal, no matter at what stage of the proceedings they may have become parties, have their recourse.

Borde vs. Erskine et al., 822.

An appeal bond given for the full amount required by law, but in which two, or more sureties bind themselves, each for a designated part of that amount, is a good and legal bond.

Heirs of Gutierrez vs. Croner et al., 827.

To suspensively appeal from a judgment which orders the delivery of movables and immovables, the amount of the appeal bond should exceed by one half the estimated value of the movables, and of the revenues to be derived from the real estate pending the suit.

State ex rel. Ella Smith vs. Judge of the Second District Court, 838.

The omission to state the day of the month in the date of an appeal bond, when the month and year are given, is supplied by the date of the filing of the bond.

Failure to set forth specifically the amount of an appeal bond is not ground to dismiss the appeal. It will be assumed that it was given for the amount prescribed in the order of court granting the appeal.

Indicating the clerk of the lower court, the payee in an appeal bond, by abbreviated signs is not fatal to the bond, if its recital elsewhere make certain what court and clerk were meant.

Eschert vs. Harrison, 860.

APPEAL—Continued.

Appeals from Interlocutory Decrees.

A judgment was rendered *in concurso*, without fixing the amount due to each claimant. Afterward, one of the creditors, on a rule for that purpose, obtained a decree fixing the sum due him, which was over five hundred dollars. One of the parties in interest applied for a suspensive appeal. It was refused, on the ground that the decree was an interlocutory one.

Held—That the decree was final, and that from all final decrees, where the sum involved is over five hundred dollars, a suspensive appeal lies.

State ex rel. P. Bouron vs. Judge of the Fifth District Court, 59.

An interlocutory decree dissolving an injunction may be appealed from. Union Insurance Company vs. Mrs. Delphine Benit, 297.

No defect in a premature appeal taken from an interlocutory decree in a case, can prejudice the appeal subsequently taken from the final judgment in the case.

Succession of Carmelite Planchet, 520.

An order of court granting a continuance of a case can not be appealed from.

Succession of E. E. Grace. Opposition of Creditors and Heirs, 694.

The decree of the lower court granting, or refusing to grant an injunction, may be suspensively appealed from.

Beebe vs. Guinault, 795.

An interlocutory decree, rescinding a former order of the court made at its preceding term, which inflicts no irreparable injury on the complainant, can not be separately appealed from. It must come up when the case is appealed on the merits.

Injury to a party is irreparable, when the final judgment on appeal can not place him where he stood before the interlocutory decree complained of was rendered.

Delay, increased labor, and expense, do not make up a case of irreparable injury.

State ex rel. James L. Cole vs. Judge of the Fifth Judicial District, 803.

Record of Appeal. What must Appear in It. Errors and Defects in It. And Effect of Same.

When the record of appeal contains no note of the evidence offered and received in the court below; and no statement of facts agreed on by the parties, or made by the inferior judge; and no bill of exception, or assignment of error, the appeal will be dismissed. And the usual

APPEAL—Continued.

certificate of the clerk of the lower court, that such a record contains a copy of all the evidence, etc., offered and filed in the lower court, is not sufficient to maintain the appeal.

Stoughton Cooley vs. H. H. Broad et al., 71.

The charge given to a jury, by the judge of the court *a qua*, is not a necessary part of the record.

Bernard Soulié vs. Louis Ranson, 161.

The filing of properly certified copies of missing parts of a transcript, absent by fault of the clerk of the lower court, will be allowed, although it is not the method prescribed for perfecting an incomplete record.

Joachim Borde vs. Mrs. William Erskine et al., 822.

The incompleteness of a record, caused by the loss of a portion of it, when the loss is properly certified by the clerk of the lower court, is not a sufficient cause for the dismissal of the appeal.

Eschert vs. Harrison, 860.

It is the duty of the judge of the lower court to fix the return day of an appeal, and if a wrong day is fixed by him, the appellant will not be prejudiced thereby.

State ex rel. Hoey & O'Connor vs. J. G. Brown, Administrator of Accounts, 861.

Devolutive Appeal.

A *devolutive* appeal from a decree, refusing a mandamus on the Treasurer to compel him to pay relator a certain sum of money, will not restrain said sum in the Treasurer's hands.

The New Orleans Republican Printing Company vs. A. Dubuclet, Treasurer. H. Newgass, Intervenor, 109.

The dismissal of a suspensive appeal, for want of the proper bond will not prevent the appellant from taking a devolutive appeal, within the legal delay.

Josephine Johnson, Tutrix, vs. Clark & Meader, 762.

A public officer who has done a certain act he was ordered to do, by a decree of court in a mandamus proceeding, may take a devolutive appeal from the decree, when the act done in obedience to the decree is susceptible of being effectively undone.

State ex rel. Hoey & O'Connor vs. Brown, Administrator, 861.

Suspensive Appeal.

In computing the time within which a suspensive appeal may be taken, neither non-judicial days nor the day the judgment was signed, nor the day the appeal was taken, are to be counted.

State ex rel. Armand Mercier vs. Judge Superior District Court et al., 223.

APPEAL—Continued.

The judgment of a court removing an under-tutor can not be *suspensively* appealed from. Such a judgment must be provisionally executed.

Succession of Pauline Menendez, 408.

A judgment debtor, who having applied for a suspensive and a devolutive appeal in the alternative, elects to take the devolutive appeal, and gives the bond fixed by the court for that appeal, forfeits his right to a suspensive appeal, and therefore is not entitled to a writ of prohibition to arrest the execution of the judgment.

State ex rel. Ella Smith vs. Judge Second District Court, 838.

In counting the ten days delay within which the bond for a suspensive appeal from a judgment of a lower court must be filed, neither the day on which the judgment is signed, nor Sundays, nor the day on which delay expires, is to be included.

J. M. Tupery vs. T. M. Edmondson, 850.

A suspensive appeal will not lie from an order granting an injunction, when it does not clearly appear that the injury complained of as arising from the injunction is irreparable; such as the appeal on the merits can provide no adequate remedy for.

A suspensive appeal will lie from an order of court, which rescinds a previous order of the court setting aside a writ of injunction on bond.

State ex rel. Paul Doullut vs. Judge Sixth District Court, 869.

Who may Appeal and Right of Appeal.

A creditor who has been placed on the tableau of a succession, and recognized as a creditor, may appeal from a judgment homologating an administrator's account, although he may not have opposed the homologation.

Succession of Cloney, 327.

Any creditor of the succession, having an interest in the proceeds disposed of by the decree homologating such an account, may appeal from the decree.

Succession of Lacroix, 366.

A third person, not party to a suit, may appeal from the judgment rendered in it, provided he proves, or it appears from the record, that he has a pecuniary interest in the suit, and is aggrieved by the judgment.

State ex rel. Adrien Bonnet vs. the Judge *ad hoc* of the Second District Court, 397.

No *ex parte* statement, or motion, by one of the parties to a suit, made in the court below, can impair the other party's right of appeal.

State ex rel. Hoey & O'Connor vs. Brown, Administrator, 861.

APPEAL—Continued.

An appeal will not be dismissed on the ground that the appellant confessed judgment in the court below, when he contests the confession, and it seems to be the only ground of the judgment.

Lawson vs. Bruen, 866.

Appeals from the Supreme Court of Louisiana to the Supreme Court of the United States.

The right of removing a suit from a State, to a Federal court, is a matter reviewable by the Supreme Court of the United States, under a writ of error to this court.

A writ of error from the Supreme Court of the United States to this court, operating as a *supersedeas*, divests this court of all further jurisdiction of the case.

State ex rel. Jumel vs. Johnson, 399.

Death of Party to an Appeal—Effect of.

Where one of the appellees has died, the appeal, as to his succession, can not be dismissed until his representatives have been made parties to the appeal.

Mrs. B. S. Hearing and Greig vs. Mound City Life Insurance Company, 832.

Citation of Appeal.

The service of citation of appeal before the filing of the appeal bond, is not ground for dismissing the appeal.

Marie L. Beebe vs. James P. Guinault et al., 795.

Citation of appeal should be served on a resident party in person, or at his domicile, not on his attorney. But if an improper citation has been made by the sheriff, not shown to have been caused by the fault of the appellant, it will not justify the dismissal of the appeal.

Borde vs. Erskine et al., 822.

Where a party sues in an individual capacity, and afterward, during the progress of the suit, subrogates a succession of which she is executrix to her rights, without notice of the subrogation to the defendant, the latter will not have the appeal he may take in the case dismissed, because he has only cited the plaintiff in her individual capacity. In such case the appellant will be allowed time to cite plaintiff in her administrative capacity.

No error or defect in the petition, order or citation in an appeal will cause the appeal to be dismissed, unless it be shown that such error or defect is to be imputed to the appellant.

Hearing et al. vs. Mound City Life Insurance Company, 832.

APPEAL—Continued.

Appeal by Motion in Open Court.

An appeal by motion in open court can only be taken pending the term of court, during which the judgment was rendered.

Untereiner vs. Miller, 435.

It is improper to appeal from a judgment by motion in open court, except during the term of the court at which the judgment was rendered; but if the appeal is thus taken at a *subsequent term*, and the appellee appear and file an answer, the defect will be cured, and the appeal maintained.

Succession of Carmelite Planchet, 520.

When a motion for an appeal is made in open court, during the same term at which judgment is rendered, no citation of appellee is necessary.

John G. Sanders vs. Adeline Edwards, Administratrix, 696.

The Time Within which Appeals must be Taken.

The delay for taking a suspensive appeal can not be extended by agreement of counsel.

This court is absolutely without jurisdiction of any appeal, taken after the legal delay for an appeal has expired.

Utereiner vs. Miller, 435.

Who are Necessary Parties to an Appeal.

When the sheriff is not interested in an injunction suit, and is only connected with it by having had a notice served on him that the writ was suspended, he is not a necessary party to an appeal in such a suit.

T. Eschert vs. W. C. Harrison et al., 860.

ARREST.

An arrest, without probable cause, raises a presumption of malice.

Mary Hardy vs. John A. Stevenson, 172.

Damages for Illegal Arrest.

On assessing the damages for an illegal arrest the *character* of the complainant should have some influence in determining the amount of damages.

Hardy vs. Stevenson, 172.

ATTACHMENT.

On the Rule to Dissolve, What may be Inquired into.

On the trial of a rule to dissolve an attachment, the truth of all the allegations of the petition can not be inquired into, as that would be trying the case on the merits.

A. B. Miller vs. D. C. Chandler, 88.

ATTACHMENT—Continued.*Affidavits in Attachment.*

Where the affidavit for an attachment attests the truth of all the allegations of the petition, and the petition sets forth the non-residence of the defendant, and a cause of action, the affidavit is sufficient.

Miller vs. Chandler, 88.

Bonds and Sureties in Attachment.

The amount of an attachment bond must exceed by one half, the sum demanded.

Miller vs. Chandler, 88.

On What Grounds Attachment may Issue.

An unfair preference given by an insolvent to one creditor, and his misrepresentations to his creditors, intentionally made to lull them into a deceptive sense of security, will justify them in attaching his property.

J. H. Stevens vs. J. L. Helpman, 635.

ATTORNEY AT LAW.

An attorney at law has no authority, unless specially empowered by his client, to confess judgment for the latter.

Edwards vs. Edwards, 595.

ATTORNEY GENERAL, AND DISTRICT ATTORNEY.

The Attorney General, or district attorney, may employ associate counsel to aid him in a case, and, being present, may entrust to his associate the exclusive conduct of the case.

State vs. Anderson, 774.

AUCTIONEER.

The creditor of a succession can not demand that the auctioneer, who has sold property of the succession, shall pay over the proceeds of the property. Only the one charged with the administration of the succession is empowered to make such demand.

The auctioneer is entitled to reserve out of the proceeds of property sold by him, the amount of his commissions, and the expenses of the sale.

Succession of M. M. Dowler, 437.

BANKRUPTCY.

Under the bankrupt act the assignee of any bankrupt is authorized to become a party to any suit pending in a State court either for or against the bankrupt, but he can not be compelled to become a party to such suit by any order of court.

A party sued in a State court who has been adjudicated a bankrupt may ask for and obtain a stay of proceedings until his application for a discharge has been passed on. If he has obtained a final dis-

BANKRUPTCY—Continued.

charge he may plead it in bar of all claims from which such a discharge liberates him. If, however, he fails to plead his adjudication or discharge in the lower court, that court will adjudicate the case without regard to such facts.

The assignee of a bankrupt can not intervene in a suit in which the bankrupt is sued, and set up either the latter's adjudication or discharge in bankruptcy as a ground for staying proceedings, or in bar of the action. That is a right personal to the bankrupt.

J. M. Serra é Hijo vs. Hoffman & Co., 17.

A certificate of discharge in bankruptcy, made according to the forms prescribed in the bankrupt act, is receivable in evidence before any court, to prove the fact of the discharge, and its regularity.

A discharge in bankruptcy is a complete bar to any suit brought against a bankrupt in a State court, to enforce a debt which has been extinguished by that discharge.

Miller vs. Chandler, 88.

Section 5057 of the United States Revised Statutes declaring that suits by, or against an assignee in bankruptcy, touching any property, or rights of property transferable, or vested in such assignee, must be brought within two years from the time when the cause of action accrued for, or against him, only applies to causes of action which accrue after the bankruptcy and in which the defendant really sets up an adverse interest to the plaintiff. It does not apply to suits brought by, or against the bankrupt, before his bankruptcy, and to which the assignee merely makes himself a party, in order to carry on the suit.

R. G. Latting vs. Fassman, Bryant & Co., 280.

A discharge in bankruptcy, like prescription, does not expunge, but merely bars the recovery of debts, and if not specially pleaded, will not be noticed.

John T. Ludeling vs. Mary H. Felton and Husband, 719.

BANKS.

SEE CORPORATIONS.

NATIONAL BANKS.

National banks, like any other corporations, and the receivers of the same, may sue, and be sued, in the State courts of their domicile.

John I. Adams & Co. vs. Thomas J. Daunis et al, 315.

A bank organized under the national banking act may sell any immovable it owns, and reserve a mortgage, and vendor's privilege on it.

N. O. National Bank vs. Raymond, 355.

BILLS OF EXCHANGE, AND PROMISSORY NOTES.

The holder of a negotiable note, who has bought it in good faith, and before its maturity, acquires a valid title to it, though it be shown that the vendor of the note was not its owner, and had fraudulently disposed of it.

R. N. Ogden vs. A. Marchand, 61.

The maker, and the indorser of a promissory note, although not technically debtors *in solido*, are yet liable, *each*, for the whole debt.

Paul Mack vs. C. E. Fortier et al., 63.

The holder of a negotiable note of a married woman, who has taken it for value, and before maturity, is yet liable to have pleaded against him every defense arising out of the wife's incapacity.

Conrad et al. vs. LeBlanc, Sheriff, 123.

The pledge or sale of a negotiable instrument before its maturity carries with it all the liens by which the instrument is secured, and by such sale, or pledge, the transferee divests himself of all power to affect the liens which secure the instrument.

Mechanics' Building Association vs. C. L. Ferguson, 548.

The consideration of a negotiable note given by the tutor of the minor, as such, on the advice of a family meeting, may be inquired into in the hands of the payee, or of any third person who has taken it after maturity.

Clement & Tremoulet vs. Sigur et al., 798.

BOARD OF LIQUIDATORS.

The act of 1875 requiring a final decree of this court as to validity of certain "doubtful" bonds enumerated therein, before the Board of Liquidators will be permitted to fund them, does not require that there should be a final decree on every individual bond of a certain issue.

A final decree of this court affirming the validity of one of the bonds of a certain issue (under ban), removes the taint from that issue, and puts all of its bonds on the same footing with the other bonds of the State that have not been legislatively tainted. But this restoration to legitimacy of those bonds does not give their holders the right to compel the Board of Liquidators, by mandamus, to fund them.

The Board of Liquidators have a certain discretionary power as to the funding of all State bonds, and warrants, and hence can not be compelled to fund them by the summary process of mandamus.

State ex rel. O. J. Forstall vs. the Board of Liquidators, 690.

BILL OF LADING.

The clause in a bill of lading, which acknowledges the receipt of property, or declares as to its condition, may be disproved by parol proof.

The holder of a bill of lading can acquire no greater rights under it than were possessed by the original consignee.

Hunt & Macaulay vs. Mississippi Central Railroad Co., 446.

BONDS.

When a third person intervenes in a suit, and by an illegal order of court takes possession of property involved in the suit, on executing a bond for its value, he, and his surety will be liable on the bond. Such a bond, though not a judicial bond, is a binding conventional obligation for its full amount.

Todd vs. Gordy, Sheriff, 498.

CITATION.

SEE PRACTICE.

CLERKS OF COURTS.

The clerks of the lower courts are authorized to record all decrees and mandates of the Supreme Court, made in cases originating in their courts, and to issue all legal processes necessary to the execution of such decrees and mandates.

Adeline Edwards vs. Samuel Whited, 647.

COMITY.

In the interpretation of commercial contracts, this court will be largely influenced, and guided, by the law merchant of the United States, and the constructions of that law made by the Supreme Court of the United States.

Chaffraix & Agar vs. Price, Hine & Tupper, 176.

COMMON CARRIER.

A railroad corporation will not be held liable for the value of property erroneously receipted for by one of its station agents, and which was never received by the road, when the party claiming the value of the property, who is the factor and agent of the alleged consignor, fails to show that he has made any specific loan on said property, on the faith of the agent's erroneous receipt.

The case would not be different, even if the plaintiff were a stranger, who had advanced money purely on the faith of the receipt.

A common carrier is no more bound by a bill of lading given by his agent, for goods not received by him, than by a bill of exchange signed with his name by one not authorized to sign it.

Hunt & Macaulay vs. Mississippi Central Railroad Company, 446.

COMMON CARRIER—Continued.

The owners of a vessel are not liable to the employee of a stevedore who has full charge of the unloading of the vessel, for injury to the employee caused by defective tackle furnished by the vessel, when it is shown that the tackle had no *apparent* defect and that the stevedore was an experienced, and competent one, who had the exclusive employment of his laborers, and control of the work. The owners are not liable for any injury caused by a defect in the tackle, arising from the ordinary wear and tear, unless a knowledge of such defect is brought home to them.

Catherine Riley, Tutrix, vs. State Line Steamship Company, 791.

COMMUNITY.

Property purchased during marriage, whether in the name of the husband, or the wife, becomes community property.

Succession of Carmelite Planchet, 520.

Property purchased during marriage in the joint names of husband and wife is *community* property, although paid for with the wife's paraphernal funds.

Mrs. Nancy E. Tally vs. William Heffner, Sheriff, et al., 583.

After the dissolution of the community, the husband, as its former head, has no power to sell, and can convey title to no greater part of the community property than his undivided half-interest in it.

W. W. Bennett vs. J. W. Fuller, 663.

CONFLICT OF LAWS.

The law of this State prohibiting an individual from doing business under a *firm* name, does not affect a person residing in another State.

Succession of Bofenschen, 711.

CONSTITUTION.*Federal Constitution.*

The State may incorporate a company to convert an unnavigable, into a navigable stream of water, and, under the express or implied consent of Congress, may authorize the corporation to assess a charge for the use of the stream, on all vessels which shall thereafter navigate it. And such a charge is not a toll, or duty, forbidden by the constitution of the United States, but is a compensation for labors actually performed by the corporation, and availed of by said vessels.

The consent of Congress, by which the State is authorized to empower one corporation to assess a toll for performing certain services, will, unless expressly withdrawn by Congress, inure to the benefit of any

CONSTITUTION—Continued.

subsequent corporation chartered by the State to perform and which does perform said services.

Carondelet Canal and Navigation Company vs. Narcisse Parker,
Master and Owner of Schooner Victoria No. 2, 430.

State Constitution.

The amendment of the State Constitution, adopted by the popular vote in November, 1874, which forbids any increase of the debt of the city of New Orleans after the first of January, 1875, did not design to prevent the payment of any pre-existing legal debt of the city, in the way stipulated in the contract creating the debt.

State ex rel. Henry vs. City of New Orleans, 863.

CONTINUANCE.

SEE PRACTICE.

CONTRACTS.

The stipulations made by parties in their contracts, are the law to them, and to their assigns under the contracts, except when such stipulations are in contravention of public law, or good morals.

Joseph Larguier vs. J. Hays White, 156.

The agreement by which a creditor, who has bought his debtor's property, stipulates to reconvey it to the debtor on condition that the latter pays a certain price within a certain time, is a valid contract, and if the debtor fails to pay the price, in accordance with the terms of said contract, his right of redemption will be forfeited, and the title of the property will vest absolutely in the purchaser.

Soulié vs. Ranson, 161.

Default.

The tender by one party to a commutative contract to perform his part of it, made long after the time fixed for its performance, is too late to put the other party in default.

Bennett vs. Fuller, 663.

Nullity of Contract.

Before a party can annul his contract, he must restore what he has received under the contract, and place the other parties in interest in the position they occupied previous to the contract.

Mrs. Sarah A. Blake vs. S. O. & T. A. Nelson, 245.

Putting in Default.

Whoever actively violates a contract, need not be put in default.

Laloire et al. vs. P. S. Wiltz & Co., 329.

CORPORATIONS.

Charitable and Religious.

When a church congregation, who own the soil of a cemetery, have for a great many years entrusted the administration of the cemetery,

CORPORATIONS—Continued.

and the sale of its lots to the priests of their church, they clothe the priests with power to create servitudes on the soil of the cemetery; which will be binding on the congregation, and on all third persons. The property of an extinct religious corporation vests in the former individual members thereof, who may validly sell the same, in accordance with the customs they may have tacitly, or expressly adopted, provided such customs do not conflict with the laws of the State.

Burke vs. Wall, 38.

MUNICIPAL AND POLITICAL CORPORATIONS.

A municipal corporation can impose no tax on any occupation, unless authorized to do so by its charter.

The Mayor et al. of the Town of Plaquemine vs. Gustave Roth, 261.

The consent of a municipal corporation to a contract may be as effectually given by the action or inaction of the common council, as by a formal resolution of the council.

A. R. Booth vs. the City of Shreveport, 581.

Political corporations are not bound by the unauthorized acts of their agents, when the mandates of the latter are of record, or embodied in a statute.

Lisso vs. the Parish of Red River, 590.

The municipal authority of a town has a right to remove, or cause to be removed, any obstruction of the public streets.

Mere non-usage by the public of the soil forming part of a public street will not prescribe against the right of the municipal corporation, and the public, to resume its use, and clear it of obstructions.

John H. Sheen et al. vs. Robert Stothart et al., 630.

The power of an illegal, but *de facto* mayor of a city (who acts under color of a legal appointment), to represent the city in a legal proceeding, can not be called in question collaterally.

The power to forbid the erection, and compel the removal of buildings formed of combustible materials, within the densely-built-up parts of a town, inheres in municipal corporations, and hence does not depend on any legislative grant.

Mayor and Council of Monroe vs. Hoffman, 651.

The officers of a municipal corporation can not create obligations binding on the corporation, unless their power to do so is express; or necessarily or rationally implied by the powers that are expressly granted to them in the charter of the corporation, or is essential to the objects for which the corporation was created.

The power granted by the charter of a corporation to give such bonds as might be necessary in the conduct of its litigation, or in the cur-

MUNICIPAL AND POLITICAL CORPORATIONS—Continued.

rent administration of its affairs, does not authorize the issue of bonds for raising money.

A negotiable form will not impart validity, even in the hands of a *bona fide* holder for value, of an obligation of a corporation which it had not power to contract.

The officers of a municipal corporation can create no debt against the corporation, unless the ordinance creating the debt imposes a tax for its extinguishment.

J. D. Wilson vs. City of Shreveport, 673.

When a municipal corporation has legally contracted for certain work to be done, and to be paid for in a certain specified way, the corporation may, on the completion of the work, be compelled by mandamus, to carry out the stipulations as to payment contained in the contract.

State ex rel. Henry vs. City of New Orleans, 863.

Commercial and Banking Corporations.

An association of persons can not claim a corporate existence under the free banking act, unless they shall have fulfilled the conditions precedent prescribed by that act.

No corporation organized under the general incorporation act is permitted to engage in the banking business.

The Workingmen's Accommodation Bank vs. George T. Converse et al., 369.

The members of a corporation, organized under the laws of this State, for the purpose of transporting persons or property for hire, are not liable individually, or *in solido*, for the obligations of the corporation executed by its authorized officers.

J. H. Reinhold vs. John T. Ludeling et al., 552.

COURTS.

The act of 1874 creating the "Superior Criminal Court," for the parish of Orleans, is constitutional.

The Legislature may establish as many district courts within the parish of Orleans as the public interests shall require.

The omission of the word "*district*," in the title of the act creating the "Superior Criminal Court," does not affect its character as a district court.

State vs. Gus Anderson, 774.

Jurisdiction of.

The Superior District Court has not jurisdiction of a case to which a corporation is a party, except when the corporation has been organized under a special act of the Legislature.

Union Wood Preserving Co. vs. W. H. Bell, 13.

COURTS—Continued.

That clause in the bankrupt act which provides that a creditor who has sued a bankrupt before his bankruptcy in a State court can only go on with his suit (if the defendant pleads his adjudication or discharge) by permission of the bankrupt court, only applies to courts of original jurisdiction, in which pleas in bar may be filed. It does not apply to this court, whose jurisdiction of a case is not in any wise affected by that clause.

Serra é Hijo vs. Hoffman & Co., 17.

The action to annul a judgment must be brought before the court which rendered it.

Jurisdiction can not be given to a district court, by aggregating a number of co-plaintiffs, or co-defendants, where the sum claimed by, or demanded of, each, is less than five hundred dollars.

A district court can not enjoin the execution of a judgment rendered by a parish court.

John A. Stevenson et al. vs. D. A. Weber et al., 105.

The property of a succession can not be sold under a *fieri facias* issued on an *ordinary* judgment, even though the judgment has been given to enforce a mortgage and vendor's lien. The holder of such a judgment must go into the probate court, to enforce his rights.

Hall & Lisle in Liquidation vs. James L. Belden, 118.

A party may be sued, and judgment rendered for, or against him, by a competent court, other than that of his domicile, if he appear in such court and plead to the merits.

Marqueze & Co. vs. Leblanc, 194.

Any competent judge, other than the judge of her residence may authorize a wife, in the absence of her husband, who has no domicile in the State, to form a contract, or institute a suit.

Mrs. Sarah A. Blake vs. S. O. & T. A. Nelson, 245.

Where a conflict of privileges on certain property arises, the claims, no matter who the claimants are, must be transferred to, and passed on, by the court, under whose mandate the property was first seized.

Adams & Co. vs. Daunis, 315.

A suit against a ship, or other vessel, and her captain and owners, without naming the latter, accompanied by a provisional seizure, or sequestration of the vessel, is an action *in rem*, and of such an action, the State courts have no jurisdiction.

Only the admiralty courts have jurisdiction of suits *in rem* against vessels.

In a *personal* suit against the captain or owners of a vessel, the vessel is subject to attachment, or any other conservatory writ, that any other species of property is.

John Haeberle vs. John L. Barringer et al., 410.

COURTS—Continued.

A suit to annul an administrator's sale is not of a probate character, and, if the amount involved is large enough, should be brought in the district court.

Herrmann & Vignes vs. Fontelleu, 502.

The probate court in which a succession is opened has jurisdiction of all suits to destitute the administrator and all demands involving his duties.

A. Tertrou vs. C. C. Durand et al., 506.

The probate, and not the district court of the parish, has jurisdiction of suits by heirs against their tutors for settlement of tutorship affairs.

Elizabeth Gibbs vs. Lum & Co., 526.

Where the tutor of minors, who has been appointed by the probate court of one parish, removes with the minors and resides in *another* parish, the probate court of the latter parish will have jurisdiction of a suit brought by him to remove an under-tutor.

Mrs. Nancy M. Fraser vs. Zylicz, 534.

The parish court is without jurisdiction of a suit by creditors of a succession brought against a purchaser of a portion of its property at probate sale, to compel him either to pay the adjudicated price of the property, or have it decreed as still belonging to the succession.

Joseph T. Swan et al. vs. Mrs. Ann T. Gayle, Administratrix, and Wm. T. Atkins, 574.

The moment a succession under administration is closed, the probate court ceases to have jurisdiction of any *ordinary* suit then pending before it, in which the succession is a defendant.

And any judgment afterward rendered in such suit by the probate court, is null and void.

Leonville Augustin vs. Mr. and Mrs. M. P. Avila, 835.

The parish courts have jurisdiction, and hence have power to receive informations, in all criminal cases, when the offense charged is not necessarily punishable with death, or imprisonment at hard labor, and when the accused waives his right of trial by jury.

State vs. Lartigue et al, 642.

The heirs of a succession which has not been opened, and which is composed entirely of claims against another succession under administration in a parish court, sue the executor and heirs of the latter succession, (of which they are co-heirs,) for a partition and settlement of both successions, and to compel each heir of the latter succession to collate five thousand dollars.

Held—That the claim for collation is virtually a demand for a money judgment, and being for more than five hundred dollars, the parish court has not jurisdiction.

Flournoy vs. Flournoy, 737.

COURTS—Continued.

In criminal cases this court has jurisdiction only of questions of law, and hence can not review a verdict.

State vs. Anderson, 774.

The Seventh Municipal District of the parish of Orleans being a part of the territory of the Second Judicial District, the Superior Criminal Court for the parish of Orleans has no jurisdiction of any offense committed in said municipal district.

State vs. Williams, 779.

CRIMINAL LAW.

Where two, or more crimes are involved in a single act, but one indictment will lie.

State vs. James Augustine et al., 119.

When the facts, as charged in the indictment, constitute the crime of robbery, the mere omission of the word "rob," will not invalidate the indictment.

State of Louisiana vs. Mollie Robinson et al., 364.

An indictment which fails to conclude with the words "against the peace and dignity of the same," *i. e.*, the *State*, is fatally defective.

The State vs. Robert Nunn, 589.

The accused in one case can not avail of an exception to the venire filed by the accused in another case.

Threats of deceased against the accused, are not admissible in evidence until it be first proved that the accused had been advised of them.

The affidavit of an accused that an absent witness would prove that his life was threatened by the deceased, and that he killed deceased in self-defense, is not ground for a continuance.

State vs. McCoy, 598.

An indictment charging an act, with intent to commit murder, which does not aver that the act was "willfully and feloniously" done, is fatal.

The State vs. Jake Thomas, 601.

An indictment for stealing need not expressly designate the offense charged as grand or petty larceny.

The judge is authorized, on his own motion, to strike a juror from a regular panel, if satisfied that the juror is morally unfit to return a just verdict.

The State vs. J. H. Lartigue and Thomas Williams, 642.

In a criminal case the judge may, even after the evidence is closed, reopen the case at any time before the argument begins.

The juries in criminal cases, as a rule, should not be permitted to take with them to their places of consultation any part of the evidence that may be in writing. They must rely on their recollection of the evidence.

State vs. Colbert, 715.

CRIMINAL LAW—Continued.

A question put to a witness in a criminal proceeding which suggests the answer, is not the less leading because propounded in the alternative.

A verdict of guilty on the offense charged, when a different offense only has been proved, should be set aside by the court *a qua*.

If the description of stolen property, in an indictment, is too general, it may, by permission of the court, be amended.

The State vs. Tod Johnson, 717.

The Governor's commutation of a sentence to imprisonment at hard labor, which remits the punishment imposed, and substitutes a much milder punishment, is not executory, and hence can not entitle the condemned party to release from custody, until the commutation has been consented to by the Senate.

State ex rel. Daniel vs. Rose, 755.

DAMAGES.

In a suit for damages on account of a trespass the trouble and expense the plaintiff has been illegally put to are to be considered in estimating the damages. Attorney's fees are a part of such expense, and may be proved, even when they have not been specifically pleaded.

Mary D. Cooper vs. Cappel, 213.

Consequential damages, and damages on account of deprived prospective profits, based on the opinions of witnesses, will not be allowed.
C. C. 2608.

The vendee may hold the vendor in damages for the latter's refusal to carry out the sale, for whatever loss the vendee has been thereby caused, and for whatever profits he has been thereby deprived of.
C. C. articles 2589 to 2611.

The measure of damages for a breach of contract is the loss arising naturally out of such breach; or such as is reasonable to suppose was contemplated by the parties, when they formed the contract, as would naturally flow from its breach.

A. D. Doriocourt vs. François Lacroix, 286.

A liability for damages on account of any malicious wrong is strictly personal.

Jones vs. Succession of Hoss, 564.

In a suit to enjoin a wrongful seizure, and to recover damages on account of it, plaintiff may prove the amount of his attorney's fees, like any other element of damage.

J. P. White vs. E. A. Givens, 571.

DEDICATION TO PUBLIC USE.

The dedication of property to public use may be established by any evidence which shows the intent of its owner so to dedicate it.

Sheen vs. Stothart, 630.

DEFAULT.

SEE CONTRACT.

DISTRICT ATTORNEYS PRO TEMPORE.

The power to fill the office of district attorney *pro tempore* vests in the Governor, by virtue of the general law authorizing him to fill vacancies in office.

State ex rel. Farrar vs. Garrett, 637.

The office of district attorney *pro tempore* has not been abolished.

State ex rel. Vaughan vs. Richmond, Sheriff, 705.

DONATIONS INTER VIVOS.

A donation of future property, contained in a marriage contract, is not a legacy. It is a donation *inter vivos*, and at the death of the donor becomes a debt of his succession.

Succession of Hugh McCloskey, 237.

A promissory note for a certain sum executed by a person in favor of his employee, payable at the maker's death, although said sum be not legally due, will not be deemed as a donation in disguise, if it appear that the note has for its consideration the natural obligation in favor of the employee, arising out of his long services to the maker.

Bazile Barthe vs. Succession of J. Lacroix, 326.

ELECTION LAWS.

In a contest for an elective office all of the relevant facts of the election will be scrutinized by the court, and all legal evidence tending to show who was the real choice of the suffragans, or who *would* have been, under an honest execution of the election laws, is admissible. Except when the prescription of an election-law is that a thing shall be done in a certain way, and not otherwise, it will be construed as merely directory.

The disregard of a merely directory provision in an election-law, will not invalidate an election held under that law, if such disregard has not admitted the votes of disqualified, nor excluded the votes of qualified voters, nor clothed the result of the election in doubt.

The failure to return the result of a certain poll, within the time prescribed by law, does not of itself authorize the rejection of the vote of that poll.

Votes fraudulently cast, and those of disqualified persons, must be rejected.

Votes cast at a place clandestinely selected by a supervisor of election, and inconveniently remote from the polling-place legally fixed, and published, must be excluded from the count.

The object of all laws regulating elections is under our system to se-

ELECTION LAWS—Continued.

to secure the great end of carrying out the popular will, and courts of justice will interpret them so as to secure and not to defeat that end—A fundamental principle of American and Louisiana law is, that it is the casting of the ballots, unimpeded by force or fraud, which determines the result of elections. The police regulations made to secure that result are merely subsidiary to it.

It is in the power of no officer or set of officers to substitute their own will for that of the people, and whenever it is attempted, it is the duty of the courts, when properly appealed to, not only to enter upon the inquiry, but to undo the wrong and award the right.

L. A. Webre vs. William Wilton, 610.

ESTOPPEL.

A party who judicially demands to be paid the proceeds of a sale, admits thereby the legality of that sale, and is estopped from impeaching it.

John Boubede vs. John O. Aymes, 274.

One who has represented himself in his own pleadings, in a former suit, as a partner in a certain firm, is estopped from afterward denying it.

Judson Fowler & Stillman vs. Henry B. Stevens, 353.

A party can not impeach the title of his transferrer.

New Orleans National Bank vs. Raymond, 355.

Whoever buys real estate within corporate limits, with reference to a certain plan which sets forth the public streets of a town, is estopped from denying the servitude imposed by those streets.

Sheen vs. Stothart, 630.

A party can not introduce evidence inconsistent with his pleadings.

Jordan & Co. vs. Anderson, 749.

EVIDENCE.

Admissions, Declarations, and Acts of Parties and Co-conspirators.

The conversations, and admissions of one of the parties to an alleged fraud, or simulation, are admissible in evidence, even though they have occurred out of the presence of the other parties.

Where fraud or simulation is at issue, any act of one of the parties to it, bearing on the issue, is relevant. In such cases a large latitude in the admission of evidence is not merely permitted, but enjoined.

Guidry vs. Lyons, 4.

Declarations, averments, and admissions made by parties in judicial proceedings can not be subsequently denied by them.

Soulle vs. Ranson, 161.

Authentic acts passed by a plaintiff or defendant, which recognize, or affirm a previous act passed by the same party, are admissible in evidence against him.

Mrs. Sarah A. Blake vs. S. O. & T. A. Nelson, 245.

EVIDENCE—Continued.

The declarations, and confessions of a co-conspirator, made after the accomplishment or the abandonment of the common enterprise, will not be received in evidence against another co-conspirator.

The State vs. Butler Jackson et al., 354.

The oral or written declarations of an alleged co-conspirator will not be admitted in evidence, until the conspiracy itself has been proved. Nor are such declarations to be received against another alleged co-conspirator, after the object of the conspiracy has been achieved.

James Reid vs. Louisiana State Lottery Company, 388.

The admissions, confessions, or declarations of a person accused of crime, can not be received in evidence against him, unless the witness who testifies to them, is able to state at least the *substance* of them.

The State vs. Edward Hughes, 514.

The written acts of a party to a contract, when they express the true intent, and explain the real nature of the contract, are admissible in evidence, even when establishing a different form of contract.

Herman Meyer, Administrator, vs. Joseph King, Administrator, 567.

Copies of Public Acts.

A mere reference in any public act to a certain plan, or record, for the sake of certainty, does not make it a part of the act, and hence a certified copy of the act is complete without such plan, or record.

Garrish vs. Hyman, 28.

Proof of Lost Instruments.

The contents of a lost instrument creating obligations can not be shown by parol, until the loss itself has been proved and properly advertised.

Samuel F. Ticknor vs. M. M. A. Calhoun, 277.

Commercial Books.

When extracts from commercial books are ordered by a court, they must be *literal transcripts* from the books, not accounts based on the books.

McLear & Kendall vs. Succession of Hunsicker, 539.

Proof of an Absentee's Signature.

Where an absentee, represented by a curator *ad hoc*, who has not been able to communicate with his client, is sued on an instrument alleged to be signed by him, the plaintiff must prove the absentee's signature as strictly, as though the signature had been denied.

Ticknor vs. Miss Calhoun, 277.

Parol Evidence—When Admissible.

As between parties to a written act of sale, and the heirs of such parties

EVIDENCE—Continued.

parol evidence is inadmissible to show the act to be simulated. Only a counter-letter can avail such persons.

Before the administrator of a decedent can show by *parol*, the simulation of a sale made by the latter, he must allege, and prove, that the sale was in fraud of creditors.

Arvenne Hébert et al., Administrators, vs. F. D. Légé, Administrator, et al., 511.

Parol evidence is admissible to explain that a party's name on a negotiable instrument was not intended as an indorsement.

E. H. Cole, Administrator, vs. James Smith, Administrator, 551.

The authority to sign another's name to a single act, if done by order of, and in the presence of the principal, need not be in writing.

Meyer vs. King, 567.

Parol evidence is admissible to show that property seized at the suit of a community creditor belongs to the wife.

Edwards vs. Edwards, 597.

Where a surety has alleged in his defense, a new and exonerating contract, made subsequent to the one declared on by the plaintiff, any fact in proof of the new contract, is admissible in evidence.

Hugh Allison, Liquidator, vs. Frank Thomas, Administrator, and L. Rosenfeld, 732.

Parol evidence is not admissible to prove an acknowledgment of, and promise to pay a debt, after the debt has become prescribed.

Mary Duncan vs. Michael Duncan, 829.

Answers of Witnesses, and their Weight with the Court.

The answers of witnesses, if practicable, should amount to mere admissions, or denials. Every thing additional will be stricken out, except such statements of fact as are explanatory of, and "closely linked" with the questions propounded.

McLear & Kendall vs. Succession of Husicker, 539.

The testimony of witnesses will have no weight with this court, if intrinsically improbable, and suggestive of collusion, and conspiracy.

Breard vs. M. & T. Ins. Co., 764.

What is Admissible in Rebuttal.

What a witness has deposed in a previous examination, in the same case, is admissible to rebut his testimony.

The admission by the plaintiff that an absent witness of defendant would, if present, swear to certain facts, will not debar the plaintiff from disproving the facts.

State vs. Colbert, 715.

EXCEPTIONS.

SEE PRACTICE.

EXECUTIONS.

In seizing property under a *fiery facias*, incumbered with liens and mortgages, the sheriff should take note of them, and allow for them, in estimating the amount of property he should seize to satisfy his execution.

The amount of the bond given for the release of property seized under execution, is not in the discretion of the court. It is fixed by law at one half over the estimated value of the property seized. See Revised Statutes, section 3411.

A judgment debtor who neglects to point out property to satisfy the execution against him, after having been duly notified to do so by the sheriff, can not afterward enjoin his creditor from seizing and selling his immovables before exhausting his movable property.

Hefner vs. Hesse, and Vergez, 149.

The adjudication of the property by the sheriff, and the payment of the price invest the purchaser with the legal title. The deed of the sheriff is merely evidence of the fact.

Jouet vs. Mrs. Mortimer, 206.

The revenues of a property, which belong to the owner of the property, can not be seized, and sold separately from the property.

New Orleans National Bank vs. Raymond, 355.

If the property pointed out by a debtor to his seizing creditor is incumbered by recorded liens which exceed its value, the creditor may disregard the debtor's election, and seize other property of the latter.

James Todd vs. M. T. Gordy, Sheriff, 498.

The law regulating the execution of judgments which is in force at the time judgment in a particular case is rendered, must govern in that case.

Carnes vs. Parish of Red River, 608.

Appraisements of Property Sold under Execution.

The benefit of the appraisalment of his property, may be legally waived by the mortgage debtor.

Jouet vs. Mrs. E. F. Mortimer, 206.

EXECUTORY PROCEEDINGS.

The possession of a negotiable note, indorsed in blank, and secured by a mortgage given in favor of any future holder of the note, will authorize the holder of the note to take out executory process.

Garrish vs. Hyman, 28.

The advertisement of property, seized under executory process, on the very day of the seizure, has no invalidating effect, provided there are thirty days advertisement, and thirty-three clear days intervene between the seizure and the sale.

Mrs. Adelina Luckett vs. Cora A. Crain, 128.

EXECUTORY PROCEEDINGS—Continued.

The signing by the sheriff (or his deputy) of the notice of demand made on the defendant in executory proceedings, is an irregularity which **can only be availed of by the defendant, by pleading it before the sale of the mortgaged property.**

The notice of the sale, in executory proceedings, need only be published three times during the thirty days delay.

Joseph Jouet vs. Mrs. E. F. Mortimer, 206.

In executory proceedings, the notice of judgment, to be served on the defendant previous to the seizure of the property, must be signed and issued by the clerk, and not by the sheriff.

Hart & Hebert, in Liquidation, vs. Pike, Brother & Co., 262.

The only evidence required to authorize a court to grant an order of seizure and sale, on certain promissory notes of the defendants, secured by a mortgage importing a confession of judgment, is a properly certified copy of the act of mortgage passed before a notary public and two legal witnesses, with the notes themselves paraphrased by the notary, and identified with the act.

Where a debtor makes a part payment of a debt evidenced by his two mortgage notes, one of which is due, and the other not due, and the partial payment is receipted by the creditor across the face of the matured note, the payment will be imputed to that note. In such case an order of seizure and sale need not make any imputation of payment; nor need such an order fix the exact balance due a creditor to whom partial payments have been made.

On appeal from an order of seizure and sale this court will not consider the rights and obligations of the parties, growing out of another suit. On such an appeal but one question will be considered, and that is, was the evidence before the court below sufficient to authorize the order.

City of New Orleans vs. J. B. Pignuolo and M. Popovich, 835.

FUNDING ACT OF 1874 AND 1875.

Under the funding act of 1874 the Board of Liquidators provided for by that act are vested with discretionary power to fund, or refuse to fund, any and every indebtedness of the State presented to them for funding; but by the act of 1875, (supplementing that of 1874,) they are prohibited from funding any bonds of the State enumerated in said act, until this court has declared them to be valid.

State ex rel. Exchange Bank vs. the Board of Liquidators, 264.

GARNISHMENT.

A party domiciled out of the jurisdiction of a court may be made garnishee, under a writ of *attachment*, but not under a writ of *fiery*

GARNISHMENT—Continued.

facias issued by that court. In cases of *fiery facias*, the garnishment process must issue from the court of the garnishee's domicile.

E. Marqueze & Co. vs. C. O. LeBlanc. Sun Mutual Insurance Company, Garnishees, 194.

It is only property in the possession of the garnishee, or a debt *absolutely* due by him, though not exigible, at the moment the interrogatories are served on him, that can be seized under a garnishment process. A prospective contingent debt can not be reached by such process.

Charles Maduel, Executor, et al. vs. P. H. Mousseaux et al. Union Insurance Company, Garnishees, 228.

GOVERNMENTS DE FACTO.

Pending the existence of a civil war, any government that may arise capable of enforcing obedience, within certain territorial limits, is entitled to exact it, and no person, under the sway of such government, can be prejudiced in any manner for yielding it obedience.

Lay vs. Succession of O'Neil, 722.

GOVERNOR.

The Governor has discretionary power to remove a tax collector, and appoint his successor. In the absence of the Governor from the State the Lieutenant Governor has a similar power.

State ex rel. the Attorney General and Thomas Carey vs. John Barrow, 243.

Where by the charter of a municipal corporation it is provided that a vacancy in the office of mayor shall be filled by election, the Governor can not legally fill such vacancy by appointment, in virtue of a general law authorizing him to fill vacancies in municipal offices.

The Mayor and City Council of Monroe vs. Joseph Hoffman, 651.

HABEAS CORPUS.

This court, or any member of the court, is competent to issue the writ of *habeas corpus* in any case that might be brought here on appeal. It is not necessary the appeal should be pending.

State ex rel. Daniel vs. Rose, 755.

HOMESTEAD.

The homestead act, which exempts one hundred and sixty acres of land, etc., from seizure and sale, is in favor of a debtor who owns the land, and who has a family dependent on him for support. The benefit it confers is strictly personal. It is likewise in derogation of common right, and, hence, does not descend from the debtor in favor of his widow, or his children.

P. E. Briant vs. G. Lyons, Sheriff, et al., 64.

HOMESTEAD—Continued.

A mortgage on property exempt under the homestead act can not be enforced; and the owner of such property may sell the same, *free from the mortgage* he has imposed on it.

Jacob C. Van Wickle vs. Aloée Landry, 330.

The homestead law embodies, in part, the public policy of the State, and rights acquired under it can not be waived by any convention of parties.

Mrs. Hardin vs. Wolf & Cerf, 333.

The widow's claim under the homestead act ranks all privileges, except that of the vendor.

Succession of Marc, 412.

The fact that a debtor has other property than his homestead, or has fraudulently disposed of other property, does not affect the exemption of the homestead, if his condition brings him within the operation of the homestead law.

White vs. Givens, 571.

The preference on the proceeds of his debtor's property, which a creditor has acquired by procuring the cancellation of a fraudulent mortgage on that property, is inferior in rank to the widow's claim under the homestead law.

Succession of H. T. Cottingham. Opposition of the Widow, 669.

HUSBAND AND WIFE.

The surviving husband is absolute owner of one half the community property, and life-time usufructuary of the other half, which latter half the heirs of the deceased wife can not set up any claim to during his life.

Succession of Carmelite Planchet, 520.

When husband and wife are co-defendants in a suit they may be legally served by a citation to each, or to the husband alone.

When husband and wife are co-defendants he sufficiently authorizes her, by appearing in the suit, and aiding her in her defense.

Jordan & Co. vs. Anderson, 749.

INJUNCTION.

The purchaser of a cemetery lot, whether he acquire an absolute or qualified property therein, is entitled to the equitable remedy of injunction, to protect him in the full enjoyment of the lot.

Burke vs. Wall, 38.

Where the defendant, who has been cast, fails to appeal, or to join in the appeal taken by the plaintiff, and thereby acquiesces in the judgment, he can not, after this court has affirmed the judgment and the plaintiff proceeds to execute it, enjoin its execution; even

INJUNCTION—Continued.

though it appear that the plaintiff issued his *feri facias* before the judgment of this court was filed and recorded in the court below.

Jourdain Savole, Administrator, vs. P. A. Thibodaux, 51.

The whole object of a rule *nisi*, in matters of injunction, is to enable the defendant to show, if he can, that on the face of the papers, the injunction ought not to be granted. On the trial of the rule, no affidavit from either side, bearing on the truth of the allegations of the petition, will be admitted in evidence.

The refusal of the court, on a rule *nisi*, to grant an injunction, may be appealed from.

L. Heyniger & Co. vs. A. Hoffnung et al., 57.

Where the process of the court, in an injunction, does not seem to be seriously abused, special damages need not be imposed.

Lockett vs. Crain, 128.

The sureties on an injunction bond can not be held liable for the amount of the judgment enjoined, unless it be proved that the judgment was lost in consequence of the injunction.

An injunction will not lie on account of an excessive seizure under a *feri facias*.

When it appears that an injunction has not been wantonly issued, but that plaintiff has resorted to it under a mistaken but honest belief that he was entitled to do so, only such damages will be allowed on its dissolution as cover the court costs, and counsel fees of defendant.

A. Hefner vs. S. Hesse and H. Vergez, 149.

An injunction will not issue, at the instance of the taxpayers of a municipal corporation, to prevent the officers of that corporation from holding an election, under the authority of a legislative act, to enable the citizens of the corporation to vote to levy, or not levy, a certain tax on themselves. The action is premature. No right of the plaintiffs is, as yet, invaded, and the danger they seek to shun is too remote, and contingent, to warrant the issuance of an injunction.

L. C. Roudanez et al. vs. the Mayor and Administrators of the City of New Orleans. New Orleans and Pacific Railroad Company. Interveners, 271.

The release of an injunction by bond, is a matter confided to the discretion of the lower court.

State of Louisiana ex rel. F. Comminge et al. vs. the Judge of the Superior District Court, 360.

A party applying for a writ of injunction, who has complied with all the conditions prescribed by law for its issuance, has a right to it, and courts have no legal power to refuse it.

Beebe vs. Guinault, 595.

INJUNCTION—Continued.

Damages can only be allowed by the decree dissolving an injunction, when the judgment which has been enjoined is for money.

Sheen vs. Stothart, 630.

DAMAGES IN INJUNCTION.

SEE DAMAGES.

INSURANCE.

Where a policy of insurance stipulates for payment of losses sixty days after adjustment, and the assurers make reasonable efforts to effect an adjustment, they will not be liable for interest from the expiration of the sixty days, but only from judicial demand.

Gettwerth and Wife vs. Teutonia Insurance Company, 30.

The defense that plaintiff has violated, in some particular, the policy of insurance sued on, must be proved by the defendant.

A wife holding property in her own name, donated to her by her father, during marriage, has an insurable interest in it.

Breard vs. Mechanics' and Traders' Insurance Company, 764.

Before a third person can sue on a policy of insurance to which he is not a party, no matter what his interest in the insured property may be, it must be shown that the policy was assigned to him with the written consent of the assurer, and that the property assured had been assured as his property.

A consignee who fails to insure property shipped to him and received by him, after having been instructed to insure by the shipper, is liable for any loss resulting from his not having insured.

A consignee who has insured a consignor's property in his, *consignee's*, name, and fails to collect the insurance money, becomes liable himself as insurer.

Gordon & Gomilla vs. Wright & Clark, 812.

INTERDICTION.

In a suit for interdiction the fullest investigation into the motives of the plaintiff will be allowed.

In passing on the issue of interdiction, the court will not be controlled by the opinions of experts, but giving to them a respectful consideration, and to every fact bearing on the issue its legitimate weight, will form, and decree its own conclusions.

Mere weakness of mind in the defendant will not justify a decree of interdiction, when in view of all the evidence adduced, such decree is not necessary either for the protection of the defendant's property, or person, or of society.

Justus Francke vs. His Wife, 302.

INTEREST, AND COMPOUND INTEREST.

Where a factor's account is closed, stated, and rendered, at the end of the commercial year, and not objected to by his client, showing a balance in his favor composed of principal and *accrued interest*, on such balance interest may be charged in any subsequent accounts between the parties. Interest on such a balance is not compound interest.

Sentell & Co. vs. Mrs. M. G. Kennedy and Husband, 679.

JUDGES.

The judge of a court who has rendered a judgment which is null and void, can not, as creditor of one of the parties, avail himself of the nullity.

Osborn vs. Segras, 291.

The judge *a quo* may make any ruling as to the manner of conducting a trial, in order to secure a prompt decision, which is not prohibited by law, and which works no prejudice to the accused.

State vs. Mollie Robinson, 364.

When he is neither "personally interested" in the case, nor connected by blood or marriage with a prisoner arraigned before him, the judge must, on being *recused*, appoint a lawyer of proper qualifications to sit in his stead.

State vs. McCoy, 598.

The law which empowers judges to suspend sheriffs from office, on account of the latter's neglect, or refusal to perform their duties, is constitutional.

State ex rel. Frank Vaughan, District Attorney pro tempore, vs. W. L. Richmond, Sheriff, 705.

Section 1068 of the Revised Statutes of 1870, providing for the interchange of two neighboring district judges, when one of them is *recused*, is unconstitutional.

When a judge is *recused* in a case in which he is *not* personally interested, he must select a lawyer, of proper qualifications to try it. When he is personally interested, the parish judge must preside in his stead.

State ex rel. Hunter vs. the Judges of the Ninth and Seventeenth Judicial Districts, 785.

On the *recusation* of a district judge in a particular case, an attorney at law can not be compelled to accept the appointment of judge *ad hoc*, to try the case in place of the *recused* judge; nor to act, even after having accepted the appointment, and passed on some preliminary questions in the case.

State ex rel. Fuqua, Tutor, vs. Brame, Special Judge, 816.

JUDGMENT.

It is not necessary for a judge to give a statement of reasons, in an order of seizure and sale.

Garrish vs. Hyman, 28.

In a suit brought to revive a judgment no plea will be entertained, and no evidence considered, which assails the validity of the judgment sought to be revived.

Nelson McStea vs. Rotchford, Brown & Co., 69.

No correction, or alterations of a judgment can be made by the court, *ex proprio motu*, after the judgment has been entered on the minutes, except such as are merely clerical, or rectify errors of calculation. No change in the substance of a judgment can be made, save by means of another formal decree, rendered after a new trial of the case.

Miller vs. Chandler, 88.

Judgment can not be had on a debt not yet due and exigible.

W. E. Wamsley vs. J. A. Hunter et al., 628.

Nullity of Judgment.

The nullity of a judgment, or of a judicial sale, can only be demanded by one, who has used due diligence to prevent, what he seeks to annul.

Jouet vs. Mrs. Mortimer, 206.

A judgment homologating the account of an administrator, where no evidence has been adduced to show the correctness of the account, is invalid.

Succession of James Cloney, 327.

A judgment in favor of a party who has subrogated another to his claim is illegal.

Jones vs. Succession of Hoss, 564.

A judgment of this court, rendered for or against a person dead, and not represented here, is an absolute nullity.

Any judgment absolutely null may be attacked collaterally, and by any one against whom it is sought to be enforced.

Adeline Edwards vs. Whited, 647.

A judgment rendered on a prescribed note is not an absolute nullity.

Gillis vs. Carter, 698.

Notice of Transfer of Judgment.

The notice of transfer of a judgment against a deceased person, served on the widow, and natural tutrix of the decedent's children, even before she has received her letters of tutorship, is sufficient to perfect the transfer.

F. Aufenkolk vs. P. Montegut et al., 257.

What Judgments may and what may not be Rendered in Vacation, and in Chambers.

A judgment homologating the account of an administrator can only be

JUDGMENT—Continued.

rendered in *term* time, and in *open court*. It can not be rendered by the parish judge in vacation, or in chambers.

Succession of Bougère, 878.

When Judgments Rendered in the Country Parishes become Executory.

Judgments of the courts of the country parishes only take effect from the last day of the term of court at which they were rendered, no matter on what day of the term they were signed. Hence, prescription of such judgments only begins to run from the last day of the term in which they were rendered.

Zenon Broussard vs. Alcée Dupré, Administrator, 518.

Confession of.

Neither a citation of the defendant, nor a previous judgment of default, is necessary to the validity of a judgment based on the *confession* of the defendant.

Wm. Marbury, Jr., et al., Testamentary Executors, and Joseph P. Crosley vs. James F. Pace, 557.

The answer filed in a suit by a defendant admitting that he had in his hands a specific fund, for distribution among certain creditors; and that the plaintiff "appeared" to be one of those creditors, with the first preference claim on said fund; but asking that all of said creditors be cited as *in concurso*; and expressly setting up the plea of general denial, can not be construed as involving a confession of judgment in favor of the plaintiff; although he may have the ranking lien on the fund in the defendant's hands.

Samuel Lawson et al. vs. Zachariah Bruen, 866.

Acquiescence in Judgments.

The payment of *feri facias*, under the threat of the sheriff to seize and sell defendants' goods, is not of itself conclusive of his acquiescence in the execution of judgment against him.

Johnson vs. Clark & Meader, 762.

Merely submitting to the execution of a judgment by the sheriff, is not such an acquiescence in the judgment as will debar the party cast from taking a devolutive appeal.

State ex rel. Hoey & O'Connor vs. Brown, Administrator, 861.

JUDICIAL DISTRICTS.

The Legislature can not change the judicial districts pending the existing terms of office of the district judges.

When a portion of one parish, situated in a certain judicial district, is annexed by the Legislature to another parish, situated in a different judicial district, it will become a part of the latter judicial district,

JUDICIAL DISTRICTS—Continued.

on the expiration of the existing terms of office of the district judges, unless the Legislature shall otherwise provide.

Lafayette Fire Insurance Company vs. Heike Eiben Remmers, 419.

The Legislature may, within constitutional limits, make any changes in the boundaries of parishes, and of judicial districts. It may, in forming judicial districts, divide the territory of a parish into two, or more districts.

The act of 1876, making the Sixth and Seventh Municipal Districts of the parish of Orleans a part of the *Second* Judicial District, is constitutional.

State vs. William Williams, 779.

JURIES AND JURY COMMISSIONERS.

In the organization of juries, it is not necessary that the sheriff should furnish a list of all persons liable to jury duty, and put them in the jury box *every* December. The box must be exhausted before being refilled.

George L. Gettwerth and Wife vs. Teutonia Insurance Company, 30.

An irregularity in the method of returning a verdict by a jury, which does not injure any of the parties, will not vitiate the verdict.

Mary D. Cooper vs. Cappel, 213.

Persons on trial for alleged crimes have a right to demand that *all* of the regular venire of jurors present, and not then engaged on other jury duty, shall be submitted to their acceptance, or rejection, before talesmen are resorted to for the formation of juries.

The State vs. James Atkinson, 543.

A mere opinion as to the guilt of the accused, unassociated with any bias, or prejudice, does not disqualify a person to serve as juror.

State vs. Lartigue and Williams, 642.

In the selection of the persons from whom the regular juries shall be drawn for the trial of cases in the Superior Criminal Court for the parish of Orleans, the jury commissioners appointed under the law to make the selection, can not delegate that duty to any other person.

The jury commissioners must themselves make the selection, and *must* make it from *all* the qualified voters of the parish of Orleans.

Their mere approval of a selection made by some one else, can impart no validity to the selection.

A jury commissioner who has accepted another office, and qualified in it, is thenceforth constitutionally disqualified from serving as a jury commissioner.

State vs. T. J. Newhouse and A. Newhouse, 824.

LAWS.

Constitutionality, and Interpretation of.

The State tax referred to in the act of 1872, which act forbids the police jury of any parish from assessing and collecting any tax exceeding the one hundred per centum of said State tax, is merely the tax levied by the Legislature to pay the public debt and provide for the general expenses of the government. It does not include the levee, school, and other taxes levied for special purposes.

Should the necessities of a parish demand the assessment of any larger tax, such tax must first be authorized by a vote of the majority of the voters of the parish.

Charles Lafitte vs. Morgan Morgans, 1.

The act of the Legislature No. 81 of the year 1872, which abolished the free-school fund, and which ordered the bonds composing that fund to be sold by the Auditor and Treasurer of the State, is unconstitutional, and no property in any of those bonds has been acquired by any purchaser of the bonds, who may have bought them at a sale made under said act No. 81.

State of Louisiana ex rel. T. J. Durant vs. the Board of Liquidators, 77.

The act of 1869 (Revised Statutes, section 3759) which limits the application of article 132 of the constitution, (providing for the subdivision of land sold at public sales into lots) to sales made *after* the adoption of the constitution of 1868, is constitutional.

August Bohn, Applying for a Monition: J. Stanford Bossier, Opponent, 144.

The law which directs a change of venue on the naked application of the district attorney is constitutional.

The State vs. John B. McCoy, 593.

A law which has for its object to change the mode of executing judgments is merely remedial, and does not impair the obligation of contracts.

John W. Carnes vs. the Parish of Red River, 608.

An act of the Legislature proposing an amendment to the constitution has, before it has been ratified by a vote of the qualified voters of the State, no effect whatever.

No State has the power, either by legislative enactment, or by amendments of her constitution, to impair the obligation of pre-existing valid contracts.

State ex rel. William Henry vs. the Mayor and Administrators of the City of New Orleans, 863.

SEE BOARD OF LIQUIDATORS.

Promulgation of Laws.

A law is not obligatory until promulgated. Thus a court created by

LAWS—Continued.

statute continues to exist, until the act repealing that statute has been promulgated.

The mere publication of a legislative act in the official journal, is not necessarily a *promulgation* of the act. Promulgation of an act must be made by the officers, and in the special mode, prescribed by law.

State ex rel. Mercier vs. Judge of the Superior District Court, 223.

Title of Laws.

The title of a law, repealing certain sections of the Revised Statutes of 1870, adequately expresses the object of the law, when it designates the *numbers* of the sections repealed.

State ex rel. T. P. Farrar vs. Henry A. Garretty, 637.

Effect of Laws on Contracts Enacted Subsequent to the Formation of the Contracts.

A contract of pledge invalid, as to one of its clauses, at the moment of its formation, may be made valid by a subsequent act of the Legislature, enacted for that purpose; and a *renewal* of the contract, after the passage of such an act, makes it legal.

John M. Carr vs. Louisiana National Bank, 258.

LEGATEES.

A legatee who has accepted, and entered on the enjoyment of his legacy, can not afterward demand that the terms and conditions of the legacy shall be changed

Succession of Hugh McCloskey. Hugh McCloskey vs. J. D. Martin and Richard McCloskey, Executors, 406.

LESSOR AND LESSEE.

A lessee whose property has been provisionally seized, may release it by giving one of three different kinds of bond.

First—He may give a bond, whose amount is to be fixed, on his application, by the judge, conditioned that he will satisfy whatever judgment may be rendered against him, *or*, return the property.

Second—He may give a forthcoming bond, for the amount of the claim, or value of the property, to be ascertained by appraisalment.

Third—He may give an *absolute* bond to satisfy whatever judgment may be rendered against him, *embracing no obligation in the alternative*.

The release bond given by the lessee, in order to recover possession of the property provisionally seized, is the substitute for, and stands in the place of the property, and any subsequent lessor, who acquires a lien on said property, possesses a lien superior to that of the lessor whose seizure has been released.

LESSOR AND LESSEE—Continued.

After fifteen days from the removal of the lessee's property from the leased premises, the lien of the lessor is prescribed.

A lessor who has a lien on goods on his premises seized, and sold under a *fiery facias*, may intervene by rule, and claim to be paid by preference out of the proceeds.

Charles A. Conrad vs. Joseph Patzelt. James Jackson, Intervenor and Third Opponent, 465.

LIBEL.

A party can not be held in damages for allegations set up by him in his pleadings in a suit, which assail the character of the other party, when it appears that the circumstances were such that he might reasonably have believed that the allegations were true.

J. Wallis vs. the New Orleans and Carrollton Railroad Company, 66.

Where "perjury" has been charged in an alleged libel, it is for the jury to determine, by a scrutiny of the whole publication, whether the word was used by defendant in a popular sense, or as charging the technical crime of perjury.

Hawkins vs. New Orleans Printing and Publishing Company, 134.

MANDAMUS.

A mandamus will not lie to compel an officer to do a thing, as to the performance of which he has discretionary power. He can only be compelled by mandamus to perform a duty, when it is purely ministerial. The taxpayers of a parish have a right to appeal from any judgment of court, ordering the police jury to levy and collect a tax, and no acquiescence in the decree by the latter, can affect the former's right of appeal.

A police jury can not be compelled by a mandamus to levy a tax for the payment of a claim which they deny, and which has not been passed on judicially.

A mandamus will not issue, where an adequate remedy can be obtained through the ordinary legal processes.

State ex rel. N. St. Martin vs. the Police Jury of the Parish of St. Charles et al., 146.

The Board of Liquidators, under said funding acts of 1874 and 1875, having discretionary powers, can not be compelled by a mandamus, to fund any indebtedness of the State.

State ex rel. Exchange Bank vs. Board of Liquidators, 264.

The title to an office can not be put at issue in a mandamus proceeding.

State ex rel. Jumel vs. Johnson, 399.

MANDAMUS—Continued.

A mandamus will not lie to compel the mayor of a city to perform a duty which belongs solely to its common council.

The service of the writ of mandamus must be on the special officer, or officers of the municipal corporation, who are legally required to do the thing demanded.

State ex rel. H. W. Kneeland vs. the City of Shreveport, 658.

In a mandamus proceeding to compel a public officer to receive warrants in payment of a debt, the issue of the *genuineness* of the warrants may be passed on.

State ex rel. Klein & Co. vs. Pillsbury, 787.

An application for a mandamus should be made in the name of the State, but it is not absolutely necessary to do it, when the petition contains substantially what the law requires.

Malain vs. Judge of the Third Judicial District, 793.

Where a motion in open court for a suspensive appeal has been refused, and the mover, pending the term of court at which his motion was refused, makes no application to this court for relief, he can not obtain a mandamus to compel the successor of the judge who refused his motion, at a subsequent term of the court, to grant the appeal.

It is too late to apply to this court for a mandamus to compel an appeal to be granted, when the term of this court, at which the appeal was asked to be made returnable, has expired, without any effort having been made by the applicant to obtain relief from this tribunal.

State ex rel. Mary E. Brown et al. vs. Parish Judge of Iberville Parish, 809.

A mandamus will not issue, at the instance of a purchaser of real estate at a tax sale, to compel a recorder of mortgages to erase the privileges and mortgages recorded against the property (when the holders of the liens oppose their erasure), until such erasure shall have been decreed in a regular suit, conducted contradictorily with all the parties holding the recorded liens.

A mandamus can only be appropriately invoked to enforce an ascertained right, or compel the performance of a recognized duty, in cases where the ordinary legal processes do not afford an adequate remedy.

State ex rel. Fix vs. Herron, Recorder of Mortgages, 848.

SEE BOARD OF LIQUIDATORS.

MANDATE.

SEE AGENCY.

MARRIED WOMEN.

Where a note is executed by a married woman authorized by her husband for property bought by her, during marriage, and it is not

MARRIED WOMEN—Continued.

shown that she is separate in property, nor that she administered her paraphernal property, nor that she was a public merchant, nor that the property inured to her separate benefit, she can not be held liable on the note. Such a note is a debt of the community, inasmuch as the property, the consideration of the note, belongs to the community. For such a debt a wife, such as is sued herein, is incapable of binding herself. The husband alone is liable.

Mrs. M. W. Graham vs. Mrs. Z. A. Thayer, 75.

Where a wife is authorized by the judge, under the act of 1855 (R. S. sections 2433 and 2434), to mortgage her separate property for a certain sum, and for a certain purpose, and she thereupon executes the mortgage for a different sum, and for a purpose in addition to the one recited in the authorization, whoever endeavors to enforce the mortgage must prove *aliunde*, that the debt secured by the mortgage inured to the separate benefit of the wife.

Mrs. S. A. Conrad and Husband vs. G. LeBlanc, Sheriff, et al., 123.

Where a wife, separate in property, seeks to annul her transfer of paraphernal property to her creditors, made according to the forms of law, on the ground that the consideration of her transfer was the debts of her husband, the burden of proof is on her, to show in the most positive manner, the truth of what she alleges.

Sarah A. Blake vs. S. O. & T. A. Nelson et al., 245.

The holder of a mortgage, given by a wife with her husband's authority, on her separate property, *without* the authorization of the judge under the act of 1855, must prove that the debt which the mortgage was given to secure inured to the wife's separate benefit, before he can hold her liable.

A wife separated in property is liable for her proportion of the household expenses, and for the whole of such expenses, if her husband is without means.

Mrs. Mary L. Hardin vs. Wolf & Cerf, 333.

The surviving widow, although a former concubine, and only married a few days before her husband's death, is entitled to all the rights enjoyed by any other widow, under the homestead law.

Succession of C. E. Marc, 412.

A confession of judgment by a married woman, which condemns her to pay her husband's debt, is null and void.

Edwards vs. Edwards, 597.

The proceeds of a policy of life assurance taken out by the husband in favor of his wife, does not become a part of the community, but belongs exclusively to her and her heirs.

Succession of Bofenschen, 711.

MARRIED WOMEN—Continued.

- A debt contracted by the wife, or by her husband with her consent, which inures to the benefit of her separate property, is binding on her.

Jordan & Co. vs. Anderson, 749.

MORTGAGES.

- The failure of a recorder of mortgages to record a deed of sale of property, which deed has been deposited for registry with him by the *bona fide* purchaser of the property, can not in anywise operate to the prejudice of the rights of such purchaser, as owner of the property.

J. U. and H. M. Payne & Co. vs. Octavia Pavey and Husband, 116.

- Where a party sells *one* of a series of notes, secured by mortgage on certain property, without warranty, and reserving to any holder of any other of said notes equal rights, it will not debar him from subsequently proceeding on another of said notes, and subjecting said property to the ratable satisfaction of each of said notes.

Howard vs. Schmidt, 129.

- A mortgage given to secure a real debt, on which a judgment has been given, will be maintained, although it appears that the judgment, for want of jurisdiction in the court, is void.

John Osborn vs. Michael Segras, 291.

- The mortgage and judgment creditors, and the purchaser of the mortgage property at judicial sale of the property, can not, by their conventions, perpetuate a judicial mortgage, after the judgment has been extinguished on which the mortgage founded.

- A third person can not be affected by any notice of a mortgage, except the notice conveyed to him by the *inscription* of the mortgage. All are third persons, except the parties.

- The *inscription* of a mortgage, after the lapse of ten years from the date of *inscription*, unless reinscribed, is utterly void as to third persons, and is no longer any *proof* of the mortgage, even between the parties to it.

Adams & Co. vs. Daunis, 315.

- All buildings put on mortgaged real estate by the owner, are immovable, and become subject to the mortgage on the real estate.

- A mortgage creditor can not be prejudiced by any contract made by his debtor, to which he is not a party.

New Orleans National Bank vs. Raymond, 355.

- The purchaser of property sold at probate sale, which is incumbered by a mortgage antedating the title of the deceased owner, is entitled to reserve in his possession enough of the purchase price to satisfy the mortgage.

MORTGAGES—Continued.

The creditor of an insolvent succession, with a *first* mortgage on a piece of its property, who buys in the property, may retain in his hands the amount of his mortgage; provided, he gives security to refund whatever may be finally shown is not to be applied to his mortgage.

But the creditor with an inferior, or concurrent mortgage, who bids in the property, must pay over the amount of his bid.

Succession of Drauzin Triche, 384.

The unauthorized cancellation of a mortgage by the recorder of mortgages, can not impair any rights of the owner of the mortgage.

Mechanics' Building Association vs. Ferguson, 548.

If the real owner of property allows it to stand recorded in the name of another, by a title translativ of property, he puts it in the power of that other to create a valid mortgage on it.

John A. Hunter et al. vs. R. T. Buckner & Brother et al., 604.

The validity of a mortgage will not be affected by an error in the number of the "*range*" in which the property covered by the mortgage is situated, if the property is otherwise described in the mortgage with such certainty as to clearly identify it.

Betty A. Thornhill et al. vs. Edmund Burthe, 639.

NEW ORLEANS.

To enable an Administrator of the city of New Orleans to take a suspensive appeal from a judgment against him in his official capacity, he must give bond and security, as the law directs. Only the city itself is dispensed from giving an appeal bond.

State ex rel. Hoey & O'Connor vs. Administrator of Accounts, 53.

NEW TRIAL.

The bribery of a juror is good ground for granting a new trial, and it may be proved like any other fact.

Hawkins vs. New Orleans Printing and Publishing Co., 134.

NISI (RULE NISI.)

SEE INJUNCTION.

NOTARY.

The sureties on the official bond of a notary public are liable for any loss or damage caused by his affixing his notarial paraph to any mortgage note which he knew to be forged. And any one injured by his act, has a right of action on the bond against his sureties.

Rochereau et al. vs. William McC. Jones, 82.

NOVATION.

Novation is not presumed, but if the surrounding circumstances clearly indicate that the intention of the parties was to novate a debt, it will be so held.

Meyer, Weis & Co. vs. William T. Atkins, 586.

A mere change in the form of a debt does not work a novation.

Jordan & Co. vs. Anderson, 749.

The granting of a new lease, after a former lease has expired, will not work a novation, when nothing appears in evidence showing that the parties intended to novate.

J. D. Hill & Co. vs. Mrs. Bourcier et al., 841.

OBLIGATIONS.*Personal Obligations.*

A liability for damages on account of any malicious wrong is strictly personal.

Jones vs. Succession of Hoss, 564.

OFFICERS.

The illegal cancellation of an official bond will not release the sureties on the bond, from their liability for any official delinquency of their principal.

A Rochereau et al. vs. William McC. Jones et al., 82.

OFFICIAL BONDS.

SEE OFFICERS.

OPPOSITIONS.

SEE PRACTICE.

OWNERSHIP.

Whoever acquires the ownership of a lot of ground, whether by prescription or by any other form of acquisition, thereby acquires the right of way, and every other servitude incident to the property.

Burke vs. Wall et al., 38.

PARTNERSHIP.

Paying an employee a certain portion of the profits of a business, in compensation of his services, does not make him a partner of the employer.

Miller vs. Chandler, 88.

A judgment against a partnership, which has ceased to exist by the death of one of the partners before the date of the judgment, is null and void.

McCloskey, Bigley & Co. vs. Wingfield & Bridges et al., 141.

Where a party shares in the profits of a partnership, not as a principal, but as an agent, or employee, who receives a certain proportion of the profits in compensation of his services, he is not a partner.

Chaffraix & Agar vs. Price, Hine & Tupper, 176.

PARTNERSHIP—Continued.

A contract by which the owners of certain vessels unite in an association to carry passengers and freight for hire, each furnishing a certain capital to the association, and each receiving a certain proportion of the profits, constitutes the owners, as to third persons, commercial partners, and as such, liable *in solido*, for the debts of the association, no matter what restrictive clauses the contract may contain.

Stoughton Cooley vs. H. H. Broad et al., 345.

After the dissolution of a commercial partnership, the power of its former members to bind each other by note, can only arise by express mandate.

Meyer, Wels & Co. vs. Atkins, 586.

Partners in Commendam.

A partner in commendam is entitled to sue for a settlement of the partnership, and ascertain, and demand his share of its assets.

Latting vs. Fassman, Bryant & Co., 280.

PATENT RIGHTS.

When the owner of a patented machine sells to another the exclusive right to use, and dispose of the machine within a certain territory, he thereby excludes himself, and all others acting under his authority, from using or selling, within said territory, any other machine, called by a different name, and differing slightly in its construction and method of operation, but which is *substantially* the same machine, performing substantially the same kind of work.

James L. Ferree et al. vs. William P. Smith, 811.

PAYMENT.

Any third person, who demands no subrogation, may tender to a creditor, either in his own name, or in that of the debtor, the debt due by the latter, in whatever species of property the debt is payable, and compel the creditor to accept the payment in that property.

State ex. rel. John Klien & Co. vs. Ed. Pillsbury, Administrator of Finance, etc., 787.

The money received by a lessor for rent due on account of a new lease, will not be imputed to the payment of any balance due by the lessee on a former lease, of the same property, unless so stipulated by the lessee.

J. D. Hill & Co. vs. Mrs. Bourcier et al., 841.

PLEADING.

SEE PRACTICE.

PLEDGE.

The pledgee of a mortgage note, who violates the contract of pledge by pledging the note to a third person, is responsible to the owner of the note for the full amount of the note, unless he clearly proves that the note was worth less than its face.

Mrs. M. A. Laloire et al. vs. P. S. Wiltz & Co., 329.

POLICE JURIES.

The police jury of a parish is liable for any actual damage caused to a neighboring inhabitant, by building any work of public convenience that obstructs an unnavigable water-course; but the jury will not, if the work be of great convenience to the inhabitants of the vicinage, be compelled to remove it.

D. Lalanne vs. F. Savoy, President Police Jury, et al., 516.

Where an act of the Legislature authorizes a parish to issue its bonds for a certain purpose, in such form and denomination as the police jury of the parish may prescribe, the police jury must specifically authorize the issue of such bonds, and in default of this action of the police jury, all bonds issued under color of said legislative act are invalid.

Julius Lisso vs. the Parish of Red River, 590.

PRACTICE.

Property which a debtor has conveyed to another by a *simulated sale* may be seized by a creditor, in whatever hands it may be found. In such case no preliminary revocatory action is necessary.

Adolphe Galdry vs. G. Lyons, Sheriff, et al., 4.

A litigant is required to give parties in interest no other notice of his proceeding, than that prescribed by law.

Howard vs. Schmidt, 129.

Where special defenses have been set up in an answer, in conjunction with the plea of the general issue, evidence is admissible to establish the special defenses.

In an action for damages for slander, libel, or defamation, the defendant may plead the truth of what he has said, or written, and prove it by any legal evidence.

Jacob Hawkins vs. New Orleans Printing and Publishing Company, 134.

Mere inaction on the part of a plaintiff, does not amount to an abandonment of his suit.

Turner, Wilson & Co. vs. McMain, 298.

A mere trespasser can not put at issue the title of the person who is in possession, as owner, of the property trespassed on.

Hebert vs. Lege, 511.

A motion to strike out the answers of a witness, as irrelevant, or not responsive, should be passed on by the court separately, as a preliminary matter, and not referred to the merits.

McLear & Kendall vs. Succession of J. L. Hunsicker, 539.

Article 326 of the Code of Practice which provides that if a defendant denies his signature of the instrument he is sued on, he shall not, if his signature is proven, be allowed to set up any other defense, only

PRACTICE—Continued.

applies when the instrument sued on purports to be signed by the *defendant himself*. It does not apply when the instrument is signed by one assuming to be the *agent* of the defendant.

G. M. Bayly & Pond vs. E. A. Givens, Sr., 546.

Whoever claims the ownership of property which has been sold at sheriff's sale, under a judgment not absolutely null, must first proceed by a direct action to annul the judgment. Neither such a judgment, nor the sheriff's sale made under it can be assailed collaterally.

Gillis vs. Carter, 698.

The purchaser of unmortgaged property, sold under the decree of a court of competent jurisdiction, rendered in a suit where the proper parties were duly represented, can not have his title to the property assailed in any collateral manner; or, on the ground of irregularities in the legal proceedings which only the defendant in the proceedings could plead.

O'Hara vs. Mrs. Booth et al., 817.

Third Oppositions and Interventions.

A third opponent who claims a privilege on property seized under a *fiert facias*, sets forth his demand in a sufficiently specific manner when he states its *nature*, the special transaction in which it founds, its exact amount, and the particular property on which he claims a privilege.

F. S. Goode vs. John Nelson et al. E. J. Gay, Third Opponent, 143.

A third opposition is only permitted when the opponent is the owner of, or has a privilege on, the thing seized.

Boubede vs. Aymes, 274.

Opposition to the account of an administrator, and the homologation of the account, are parts of one suit, and should be passed on in *one* decree, and not in separate decrees.

Succession of Carmelite Planchet. Opposition of V. Veazey, 520.

An intervenor may make whatever amendments of his pleadings that the plaintiff may make, provided the amendments do not retard the main suit.

M. Gillis vs. B. E. Carter, et al., 698.

What may, and may not be Tried in Vacation.

A claim of ownership set up by a third person to certain property sought to be attached in a suit, can not be adjudicated on a rule tried in vacation.

City of New Orleans vs. John A. Morris, 241.

PRACTICE—Continued.

Amendment of Pleadings.

An amendment in the pleadings, by which the plaintiff, a liquidating partner, claims to be sole owner of the debt, individually, is admissible.

J. U. Payne vs. John Furlow, 160.

In Whose Name Actions Should be Brought.

The husband may and should sue in his own name to enforce any right of his wife, except when the wife exclusively administers her own property, or when the ownership of some dotal or paraphernal effect, or real right of hers is involved. A joinder of the wife will be treated as mere surplusage.

Mary D. Cooper vs. Cappel, 213.

No association of persons can appear in court as a corporation, unless organized as such, in strict accordance with law. Unless so organized it can only sue in the individual names of its members.

Workingmen's Accommodation Bank vs. Converse, 369.

Rules.

No petitory action, or action to annul, can be instituted by rule.

Any party in interest may proceed by rule to remove any thing which illegally clouds a title.

New Orleans National Bank vs. Raymond, 355.

Citation.

Service of a rule to dissolve an injunction, at the office of plaintiff, on some other occupant of the office, is not a legal service.

The appearance of a party merely to take an appeal, does not cure any defect in the service of citation on him.

Charles Marin vs. Widow J. Thierry, 362.

When an owner of property within this State, who is absent from the State, is sued, in a court, within whose jurisdiction the property is situated, he may be brought into court and have a judgment *in rem* rendered against him, either by attaching the property, or by having a curator *ad hoc* appointed to represent him. Service of citation on such curator is sufficient.

James J. O'Hara vs. Mrs. E. Booth and Nicholas Connell, 817.

Continuance.

The absence of a witness is no ground for a continuance, unless the party asking the continuance shall make affidavit that he expects to procure the absent witness, and that the facts to be proved by such witness, can not be proved by any other one, known to affiant.

State vs. Mollie Robinson, 364.

PRACTICE—Continued.

Exceptions.

When the exception filed by a defendant, is in substance an answer, and is referred by the court to the merits, the case is fairly at issue, and may be tried and adjudicated, without any further answer.

Frank Mayeur vs. B. Bloomfield & Co., 398.

The verbal reservation of a right to file exceptions, made by an attorney, in a case before a district court, is of no effect.

State vs. McCoy, 593.

An exception to the jurisdiction of a court should not be referred to the merits, but passed on at once.

Flournoy vs. Flournoy, 732.

Who are Necessary Parties to a Suit.

In an action to annul a sale of property made by an administrator, he must be made a party.

Herrmann & Vignes vs. L. Fontelieu, Administrator, et al., 502.

Cumulation of Demands.

Two or more demands, not exclusive of each other, may be properly cumulated in one suit.

Tertrou vs. Durand, 506.

PRESCRIPTION.

The action to annul a judgment is prescribed in one year from the date of the judgment.

Stevenson vs. Weber, 105.

A confession of judgment, although made in a court without jurisdiction of the case, has the force and effect of an account stated and acknowledged, and is only prescribed in ten years.

Payne vs. Furlow, 160.

The action to annul a contract on account of lesion, is prescribed in four years.

Mrs. Sarah A. Blake vs. S. O. & T. A. Nelson, 245.

The action to annul a mortgage given by a debtor in favor of one of his creditors, on the ground of simulation and fraud, is prescribed by one year from the date of the mortgage.

Renshaw, Cammack & Co. vs. Edwin C. Herbert et al., 285.

Actions to set aside public sales on account of any informalities connected with them, are prescribed, as to all persons, in five years.

Mrs. Nancy M. Fraser vs. Zylicz, 534.

The liability of the widow for her share of community debts is prescribed in ten years from her acceptance of the community.

Ludeling vs. Felton et al., 719.

PRESCRIPTION—Continued.

Prescription in Criminal Matters.

The recovery of a fine for the violation of a criminal statute is prescribed in six months from the time the fine is incurred.

The State vs. E. R. King, 704.

Interruption and Suspension of Prescription.

Legal citation upon one of several solidary debtors interrupts prescription as to all.

The interruption of prescription by a suit, works a suspension of prescription, as to every one affected by the interruption, during the pendency of the suit.

Turner, Wilson & Co. vs. W. W. McMain et al., 298.

Prescription will not be suspended on account of the absence of the creditor from the domicile of the debtor, when it appears that it was in the power of the creditor to reach the domicile, and there bring suit in time to avoid the prescription of his debt.

Duncan vs. Duncan, 829.

PRESUMPTIONS.

Legal.

In the absence of proof to the contrary, it will be presumed that notaries of other States have no greater powers than are possessed by those of this State.

McLear & Kendall vs. Succession of Hunsicker, 539.

PRINCIPAL AND AGENT.

SEE AGENCY.

PRIVILEGE.

If the proceeds of the movables and unmortgaged property of a succession do not suffice to pay off its privileged debts, those debts must be first referred for payment to the proceeds of its property incumbered by the *youngest* mortgage.

The vendor's privilege is only operative as to third persons, from the moment of its registry.

The vendor's privilege will not take rank over a mortgage recorded before its own registry, unless its own registry was made on the day of the sale.

Succession of Marc, 412.

To maintain his privilege on property sold by him, as to third persons, the vendor must *record* the sale.

Succession of Bofenschen, 711.

Seizure of property under the execution of a valid judgment, gives a lien on the property, superior to any privilege recorded against it subsequent to the seizure.

O'Hara vs. Mrs. E. Booth and Connell, 817.

PRIVILEGE—Continued.

Where a judgment creditor is clothed by law with a certain privilege, or pledge, the mere absence of any express recognition of the privilege, or pledge, in the judgment of the court, does not impair the lien.

J. D. Hill & Co. vs. Mrs. Bourcier et al., 841.

PROHIBITION, WRIT OF.

The writ of prohibition will not issue to restrain an inferior judge from doing any act, when he has, *prima facie*, jurisdiction.

State ex rel. Comminge vs. Judge Superior District Court, 860.

This court will not issue a writ of prohibition to a lower court forbidding it to proceed in a case before it, of which it has not jurisdiction, until a plea to its jurisdiction has been filed in the lower court, and overruled by it.

State ex rel. J. Larieux et al. vs. Judge Fifth District Court, 806.

PROHIBITORY LAWS.

SEE PUBLIC POLICY.

PUBLIC POLICY.

No act reprobated by law, can be made valid by anybody's ratification.

Anderson vs. Pike, 120.

RECUSATION.

SEE JUDGES.

RELEASE BONDS.

SEE EXECUTIONS.

REMOVAL OF CASES FROM STATE TO FEDERAL COURTS.

The order of a State court transferring a case before it to the circuit court of the United States may be appealed from.

Under the judiciary act of 1789 a suit is removable from a State to the Federal court, when the Federal court has jurisdiction of it, only on the application of the defendant, who is a citizen of another State, or is an alien, made at the time he files an appearance, and when the plaintiff in the suit is a citizen of the State wherein the suit is brought.

Under the said act of 1789 only an *original* suit, pending in a State court, is removable to the Federal court. Hence a suit brought in a State court to annul a judgment of that court, or to restrain its execution, being only an auxiliary suit, is *not* removable.

A Federal court is without jurisdiction to enjoin proceedings in a State court, and therefore, no suit pending in a State court, whose object is to enjoin the execution of a judgment of that court, is removable to the Federal court.

Ferdinand M. Goodrich vs. Logan Hunton, 372.

REMOVAL OF CASES FROM STATE TO FEDERAL COURTS.

The judge of a State court has jurisdiction to determine whether the party applying to remove a suit pending before him, to a circuit court of the United States, is one who is, under the act of Congress, entitled to remove the suit.

A mandamus suit in a State court is not removable to a Federal court on a plea, or allegation, which raises the issue of title to an office.

State ex rel. Allen Jumel, Auditor, etc., vs. George B. Johnson, 399.

RES ADJUDICATA.

In a suit to annul a judgment, brought within a year from the date of the judgment, the judgment can not be pleaded as *res adjudicata*.

Elizabeth Edwards and Husband vs. Edwards, 597.

When the principal parties, and the thing demanded, in two suits, are different, the judgment in one can not be pleaded as *res adjudicata* in the other suit.

Rhoda E. White vs. Myra Clark Gaines. On Rule to Traverse Answers of Garnishees, 769.

The plea of *res adjudicata* will not be considered, on a motion to dismiss. It must be referred to the merits.

Beebe vs. Guinault, 795.

REVENUE LAWS.

If an importer of foreign goods has so gravely violated the revenue laws of the United States as to render the goods liable to confiscation, and himself obnoxious to the penalties of his act, prescribed by said laws, he will become liable to any innocent purchaser of those goods, for whatever sums the purchaser may have to pay the government, in order to compromise the suit to confiscate the goods; and for all necessary expenses incurred by such purchaser, in effecting the compromise. Such a compromise inures to the direct relief of the importer, which makes the latter liable for whatever the compromise has cost the former.

Where, by the terms of the United States revenue law, the penalty of its violation is the forfeiture of the goods without alternative, then the property in said goods vests at once in the government, and no purchaser of said goods, however innocent, can acquire any title to them. They remain liable to seizure and confiscation, wherever found.

Summers & Brannins vs. J. S. Clark, 93.

REVIVAL OF JUDGMENT.

SEE JUDGMENT.

SALE.

Sales of Movables.

Where a creditor, who has bought certain movables from his debtor, by crediting the latter on his account with the price of the movables, instantly resells the property to the debtor, the sale will be valid, as between them, whether any delivery was made to the creditor, or not.

Edward J. Gay & Co. vs Crichlow & Donelson et al., 122.

What the Vendor must Do, before He can Exact the Price.

A vendor who has guaranteed a good title to the property he has sold, can not collect the price of the sale from the vendee until he has made the title good.

Wamsley vs. Hunter, 628.

Nullity of Sales.

A creditor can not annul a judicial sale of his debtor's property, (made at the instance of another creditor) on account of any informality in the proceedings affecting the sale, unless he proves that such informality has caused him an injury.

Charles T. Howard vs. William B. Schmidt, 129.

The sale of the property of an absentee, who owes no debts, and is living at the time, made by one who has obtained its administration, under an order of court, without any proof having been made that the absentee was dead, or had been absent for ten years and not heard from, is null and void.

A sale made by an order of court without authority to give the order, is utterly void and prescription will not run in its favor.

R. B. Burns vs. A. H. Van Loan et al.; and J. L. Hargrove vs. Rufus Stanley et al. Consolidated, 560.

A simulated transfer of property will not protect it from the pursuit of the real owner's creditors.

White vs. Gaines, 769.

Judicial Sales.

By appointing an appraiser, the debtor cures any defect in the advertisement of a judicial sale.

Howard vs. Schmidt, 129.

The adjudication of property sold under execution, at the suit of a privilege creditor, for a price less than the amount of a *prior* privilege is utterly void.

O'Hara vs. Mrs. Booth et al., 817.

Succession Sales.

In sales of succession property, even to pay debts, the property must bring the full amount of its appraisal, or be subsequently sold on credit. But such sales, even when the property is sold below its

SALE—Continued.

appraisement, will not be disturbed if it be shown that the property brought its *actual value*.

Herrmann & Vignes vs. Fontelleu, 502.

Property of minors, *unless sold to pay the debts of the succession*, must bring the full amount of its appraisement. Otherwise, its sale will be annulled.

Mrs. Nancy M. Fraser vs. Zylicz, 534.

SEIZURE AND SALE.

SEE EXECUTORY PROCEEDINGS.

SERVITUDE.

Where a lot in a cemetery is sold, with reference to a certain plan, on which plan appears a certain avenue, leading up to, or close beside the lot, affording a convenient highway to and from it, that avenue becomes a servitude in favor of the lot, and can not be legally obstructed.

A servitude may be shown by parol evidence.

Burke vs. Wall, 38.

SHERIFF.

The sheriff is presumed, as to any official act, to have done his duty, and who alleges that he has made an excessive levy must prove it.

Hefner vs. Hesse & Vergez, 149.

Sheriff's Deed.

The *proces verbal* of a sheriff, containing all necessary recitals, signed by the sheriff, and the purchaser of the property sold at public sale by the sheriff, and attested by two witnesses, has the legal value of a formal sheriff's deed.

Jacob Strauss vs. M. Soye et al., 270.

STAMPS.

When the mortgage act has the necessary revenue stamps, the notes identified with the act need not be stamped.

J. W. Garrish vs. W. B. Hyman, 28.

SUCCESSION.

Creditors of a succession who permit the heirs to take possession of its property without having resorted to the action for a separation of patrimony, become mere ordinary creditors of the heirs.

One who buys the interest of an heir in a succession, the administration of which has closed, and the property of which is in the possession of the heirs, does not become liable for that heir's share of the debts of the succession.

Sevier vs. Inez R. Gordon, 440.

SUCCESSION—Continued.

If the surviving husband did not open his wife's succession, of which he enjoyed the usufruct, the assets of her succession may be distributed by the probate court, in the administration of the husband's succession, when his heirs are her heirs, and the heirs of the one, set up no demand against the heirs of the other succession, involving more than five hundred dollars.

Flournoy vs. Flournoy, 737.

What are Legal, and What Illegal Expenses, in Administering Successions.

In a small succession, five per cent on the amount of the inventory is a reasonable allowance for attorney's fees.

Until it be shown that there are absent heirs, not represented, no attorney should be appointed to represent them.

The fees of attorneys for absent heirs, unless their services are proved to have been valuable to the succession, must be paid out of the shares of the heirs they represent.

The charges of notaries, and other officials, in succession matters, are fixed by law, and must be rigidly adhered to.

Succession of Harris, 743.

Acceptance of by Heirs.

The institution of a suit in the capacity of heir of a decedent, or the sale by an heir of his interest as heir in a succession, amounts to the acceptance of the succession, pure and simple.

In the Matter of Mrs. A. L. Brashear and Her Husband vs. Mrs. Charlotte M. Conner, 347.

Liability of Heirs Who Accept Purely and Simply.

Heirs who, when they attain majority, sue for a partition of the property of the succession, and enter into its possession, thereby accept the succession purely and simply. They cease to be beneficiary heirs, and become personally bound for the debts of the succession.

John V. Sevier vs. Inez R. Gordon, Wife, etc., 440.

SURETY.

A surety can not be held under a judgment void as to his principal.

McCloskey, Bigley & Co. vs. Wingfield & Bridges, 141.

The surety on a bond, by virtue of which a sheriff releases money, or other property, under attachment in his hands, is liable on the bond.

A. L. Slawson vs. Robert J. Ker, 295.

The surety of an administratrix who fails to perform her duties as prescribed by law, has a right to be released from his bond.

Sanders vs. Adeline Edwards, 696.

SURETY—Continued.

A confession of judgment by a principal, has on the surety, only the force of a private agreement between the principal and his creditor. Even after a judgment against the principal, any agreement made with him by the creditor, without the assent of the surety, which defers payment, or in any wise impairs the recourse of the surety against the principal, will discharge the surety.

Allison vs. Thomas & Rosenfeld, 732.

A surety can not benefit by an exception personal to the principal.

Jordan & Co. vs. Anderson, 749.

Pending a suit against a principal, and his surety, the surety can not ask that proceedings against him shall be arrested until the property of the principal has been discussed. In such case he can only ask, after having complied with certain requirements exacted by law, that the property of the principal shall be discussed under execution, before recourse on his property is had.

The mere neglect of a privilege creditor to sue will not release the surety of the debtor, even to the extent of the value of the privilege held by the creditor, unless it be proved that in consequence of such neglect, the privilege was lost.

J. D. Hill & Co. vs. Mrs. Bourcier et al., 841.

TAXES.

Unpaid Taxes, as Affecting Sheriff's Deeds.

The validity of a sheriff's deed is not affected by the fact that the accrued taxes on the property conveyed by the deed, had not been paid.

Jouet vs. Mrs. Mortimer, 206.

Constitutionality of Taxes.

The constitutional provision that taxes shall be equal, and uniform, does not prevent the Legislature, or any municipal corporation authorized thereto by the Legislature, from dividing the objects of taxation into different classes, and imposing different taxes on each class. It merely requires that the tax on each member of the same class shall be the same.

City of New Orleans vs. Julius Kaufman et al., 283.

Liens and Personal Obligations Flowing from Taxes.

The assessment of a tax against an individual, creates, not merely a lien on his property, but also a personal obligation to the full amount of the tax.

City of New Orleans vs. Day, 416.

Tax Laws.

Former statutes, providing for the collection of "back taxes," not being in conflict with act No. 96 of the extra session of 1877, which only refers to future taxes, are not repealed by it.

City of New Orleans vs. L. Madison Day, 416.

TAX-TITLES.

The purchaser of property, sold for taxes in accordance with the provisions of law, holds, *prima facie*, after the delay for redeeming has expired, a valid title; and such title can not be disregarded, or assailed collaterally, like a simulated title, but must be attacked in a direct action to annul.

Pierre Lannes vs. Workingmen's Bank et al., 112.

The tax-sale of property which has been assessed, and sold as the property of one who is not the owner, conveys no title to the purchaser.

The tax-sale of property is fatally defective, if the assessment or the advertisement under which the sale is made contains no description of the property sufficiently specific to clearly identify it.

The assessment stands in lieu of a judgment. It is the foundation of all which follows, and must contain an accurate and sufficient description of the property, as required by the statute.

The want of such description in either the assessment, the advertisement for sale, or in the tax-title is fatal to such title.

Valery Thibodaux vs. J. N. Keller, and Howell & Keller vs. Valery Thibodaux. Consolidated, 508.

The deed of a State tax collector is not conclusive of the legality of the title conveyed by it. If such a title is properly put at issue, its validity must be proved by the party claiming under it.

State ex rel. Louis Fix vs. F. J. Herron, Recorder of Mortgages. et al., 848.

What Property is, and What is not Exempt from Taxation.

The return of the city tax assessor, setting forth the amount of the taxable capital of a banking corporation, will be held as true, until the contrary has been shown by the bank.

When a bank claims that a portion of its capital is invested in United States bonds, stocks, or currency, it must show affirmatively, the exact amount of its capital so invested. Otherwise, its capital thus invested will not be exempt from taxation.

The mere fact that at various periods during the year the tax is assessed, the bank "held" large amounts in United States currency, will not exempt its capital from taxation to the extent of those amounts, unless the bank proves that the currency so "held" was a part of its capital.

While the ordinary deposits of United States currency (or national bank notes), in a bank by its customers enter into, and form a part of its *assets*, they at the same time create liabilities of the bank, and thus offset themselves as *assets*. Such deposits therefore do not constitute a portion of the *capital* of a bank, and hence the bank

TAX-TITLES—Continued.

can not claim that its capital shall be exempt from taxation to the amount of such deposits.

The capital of a bank which is subject to taxation, as capital, is made up of the balance of its assets remaining after deducting the debts, that portion of its assets exempt from taxation, and that portion which is taxed under another name than capital.

United States currency, and national bank notes belonging to a bank, although non-taxable, are a part of its assets, and in ascertaining the real amount of its taxable capital, such currency, and notes, must be held as compensating the debt due depositors, and thus, *pro tanto*, extinguishing the liability of the bank.

City of New Orleans vs. New Orleans Canal and Banking Company, 851.

THIRD OPPOSITION.

SEE PRACTICE.

TRESPASS.

Co-trespassers are liable *in solido*.

The attempt of a lessee, or his vendee, to forcibly remove from the leased premises, property subject to the lessor's privilege, is a trespass, sounding in damages.

Mary D. Cooper et al. vs. Samuel C. Cappel et al., 213.

Damages in Trespasses.

SEE DAMAGES.

TUTORS AND UNDER-TUTORS.

A minor can not sue his tutor for what may be due him by the latter, nor sue to subject to his claims his tutor's property, during the existence of the tutorship.

An heir who has attained majority can not subject any part of his tutor's property to the legal mortgage he may have on it, until he has first obtained a judgment of liquidation and settlement of his claims against the tutor.

Elizabeth Gibbs et al. vs. Joseph A. Lum & Co., 526.

The tutor of minors is a proper party to sue for the removal of an under-tutor.

Mrs. Nancy M. Fraser, Wife, etc., vs. Paul Zylitz, 534.

The homologation of a tutor's accounts, even when had contradictorily with the under-tutor, is not conclusive on minors, who may, after majority, contest the accounts.

The citation of an heir, by the tutor, to oppose an account rendered by the tutor after the heir is of age, puts at issue *all* of the accounts rendered by the tutor while the heir was a minor, and the latter must

TUTORS AND UNDER-TUTORS—Continued.

then and there oppose all of those previous accounts, or be concluded by them.

A tutor who has done all, in the management of a minor's property, that a prudent administrator could do, can not be held for more than the revenues actually yielded by the property, and the actual proceeds of its sale.

Sarah L. Lay et al. vs. Succession of Elias O'Neil, 722.

Going into the Confederate lines, and remaining there during the late war, by the tutor of a minor, did not forfeit his tutorship.

The tutor can not revive a debt against a minor which is prescribed.

Clement & Tremoulet vs. Achille Sigur and Mrs. L. J. Sigur, 798.

VACATION.

SEE PRACTICE, AND COURTS.

VERDICTS.

SEE JURIES.

WARRANTS.

Warrants issued by a police board, which are not in the form required by law, in order to be received for taxes, will be rejected.

State ex rel. Klein & Co. vs. Pillsbury, 787.

WIDOWS.

In no case can a widow, or the estate of a wife, be held for more than one-half of a community debt, and not even for that much unless the widow or her heirs have accepted the community.

J. B. Reihl vs. L. L. Martin, Administrator, 15.

It is the financial condition of the widow at the moment of her husband's death, and not her condition at the time she applies for the widow's portion of one thousand dollars, which determines whether she is entitled to that portion.

The removal of the widow from this to another State, will not impair her right to the widow's portion.

The creditors of a succession can not demand that the widow shall give security for the safe return of the widow's portion to the heirs.

Succession of J. G. White, 702.

Neither a decree of separation of property, nor her husband's discharge in bankruptcy, will relieve the widow from liability for one half the community debts, should she accept the community.

The widow who sells a part of the community property for her own benefit, thereby accepts the community.

Ludeling vs. Felton et al., 719.

WILLS.

A transposition of the words of a will in order to make the devise conform to some supposed intent of the testator will not be allowed when the words, just as they stand, have a manifest meaning and express a clear and intelligible idea. Such transposition is only permissible when the language of a will is senseless or contradictory.

Succession of Margaret McAuley, Wife of John A. O'Brien, 33.

Substitutions, and Fidei Commissa.

A will by which property is devised to A, and at his death to B, involves a *substitution*, which avoids the devise in favor of B.

Alexander Anderson vs. Mary A. Pike, Tutrix, 120.

The clause of a will by which the testator gives a sum of money to a minor, and directs that the sum shall be invested so as to yield a revenue until the legatee's majority, does not involve a *substitution*. The devise of a certain sum to a minor, and "in the event of her death," to another, is a valid disposition, and not a prohibited substitution.

Where the clause of a will is susceptible of two constructions that one will be adopted which gives effect to, rather than that which avoids the clause.

A naked trust, to be executed immediately, as where furniture is devised to a mother, for the benefit of her minor child, is not a *fidei commissum*.

Succession of H. D. Cochrane, 232.

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